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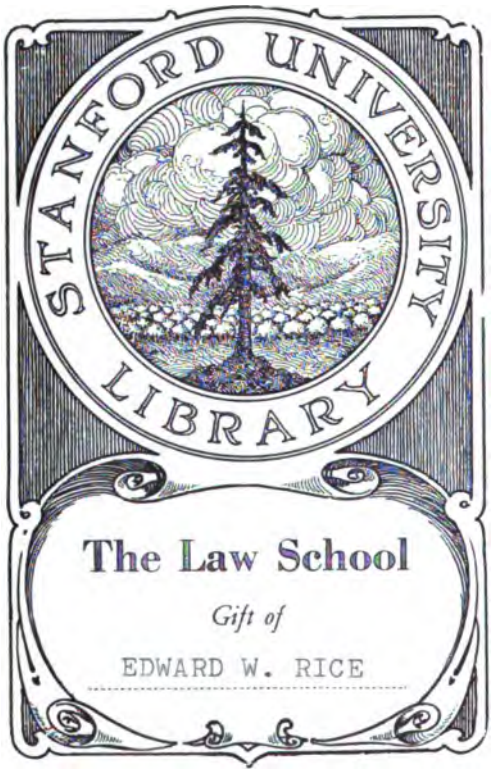
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A TREATISE

ON THE

LAW OF DAMAGES.

E. R. Wade

A TREATISE

ON THE

LAW OF DAMAGES:

COMPRISING THEIR MEASURE,
THE MODE IN WHICH THEY ARE ASSESSED AND REVIEWED,
THE PRACTICE OF GRANTING NEW TRIALS,
AND THE LAW OF SET-OFF.

BY

JOHN D. MAYNE,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

THE SECOND EDITION

BY

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OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW,
FELLOW OF TRINITY HALL, CAMBRIDGE.

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PREFACE TO THE SECOND EDITION.

In preparing the present Edition for the press, the Editor has been anxious to retain as far as possible the original form of the work, and to enable the reader to distinguish what parts of it have Mr. Mayne's authority. The additions and alterations introduced have, therefore, with a few trifling exceptions, been placed within brackets. It has been thought advisable to omit the portion of the work devoted to what are commonly called Compensation cases. They do not fall strictly within the scope of the Treatise, and the decisions upon the subject have of late years multiplied to such an extent that they could not be satisfactorily discussed in the limited space at command. The reader is therefore referred to works specially devoted to their consideration. A short chapter has been added on the assessment of damages under Lord Cairns' Act, 21 & 22 Vict. c. 27. Many Scotch and Irish cases have been cited, and reference has been made to American decisions since 1856, upon the principle and within the limits laid down by the Author in his preface to the original edition.

L. S.

Inner Temple,
August, 1872.

PREFACE TO THE FIRST EDITION.

It can hardly be necessary to apologise for the appearance of a treatise on Damages. The subject is certainly an important, and not a very easy one. The materials are scattered over all our reports, and many of our statutes. Yet, with the exception of the obsolete work by Serjeant Sayer, no English writer has ever thought of collecting them.

The American treatise, by Professor Sedgwick, has gone far to supply this want. The great merits of his work are too well known to need any commendation from me. Its ability and research will be best appreciated by those who have studied it as minutely as I have done, and I gladly acknowledge the assistance which it has afforded me. It appeared to me, however, that there was still room for an English work upon the same subject. Many topics of importance to the English practitioner are omitted by Mr. Sedgwick, partly through design, partly on account of the differences that have sprung up between the laws of the two countries. He has, also, naturally given a prominence to American cases, which is hardly satisfactory to us, oppressed as we are by the multitude of our own reports, and unwilling to extend our researches into unknown regions. Since the last edition of his treatise, our own Courts too have been remarkably prolific in decisions upon this branch of the law, and have supplied materials which well deserve a fresh attempt at classification. I have tried to collect every English case which bore upon the law of Damages; and have only resorted to American decisions, where none of our own were in point.

One of my great difficulties has been to distinguish between the right to recover, and the amount to be recovered. The line which divides these two branches of law sometimes vanishes entirely. The

right to sue at all sometimes depends upon the existence of the very circumstances which determine the measure of damages. For instance, where the wrong complained of affects the public generally, the particular loss sustained by the plaintiff is the fact which at once gives him a right of action, and gauges the compensation he is to obtain. So in actions against executors, the possibility of obtaining any real satisfaction may depend entirely upon the form in which they may be sued, whether in their representative or personal character. In many cases of torts, no measure of damages can be stated at all; and the only way of approximating to such a measure, is by ascertaining what evidence could be adduced in support of the issue. All this has made many parts of the present work resemble a treatise on the law of Nisi Prius, rather than one exclusively appropriated to Damages. Wherever such divergences appear, I must only beg the reader to attribute them to a difficulty which I have done my best to surmount.

That many errors of a much graver nature, both omissions and mistakes will be discovered, I cannot but expect. For these I must only ask the indulgence of the critic. Those who are best acquainted with the mazes of our law, will be the most ready to pardon me for going astray.

JOHN D. MAYNE.

5, Essex Court, Temple,
May, 1856.

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ERRATA AND ADDENDA.

Page 34. Note (*h*), add, "See also *Sharp* v. *Powell*, L. R. 7 C. P. 253, 41 L J. C. P. 95; *Romney Marsh* v. *Trinity House*, L. R. 7 Ex. 247; 41 L. J. Ex. 106."

Page 85. Note (*q*), add, "affirmed in Ex. Ch. L. R. 7 Ex. 263."

Page 126. Line 3, for "held," read "approved the decision of the Court of Common Pleas, M. T. 7 Geo. I."

Page 225. Note (*b*), add, "The Act does not apply to the case of a passenger carried partly by land and partly by sea, *L. & S. W. Ry. Co.* v. *James*, Weekly Notes, 20 July, 1872."

Page 255. Note (*s*), add, "*Martineau* v. *Kitching*, L. R. 7 Q. B. 336."

Page 264. Note (*n*), add, "And see as to the valuation of freight in a valued policy *primâ facie* referring to a full cargo, *Denoon* v. *Home & Colonial Assurance Co.*, L. R. 7 C. P. 341; 41 L. J. C. P. 162."

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DAMAGES.

CHAPTER I.

CASES IN WHICH DAMAGES MAY BE RECOVERED.

DAMAGES are the pecuniary satisfaction which a plaintiff may obtain by success in an action. They may rise to almost any amount, or they may dwindle down to being merely nominal. They may be governed by rules so strict as to enable the Judge to dictate their amount as a matter of law; or they may be left, within loose limits, almost entirely to the discretion of the jury. It becomes then a most important inquiry to ascertain the principles by which they are measured, and the species of evidence by which they may be aggravated or reduced. I propose, in the following work, first to state briefly the actions in which damages may be recovered; then to examine the rules by which they are measured; and finally to inquire into the practice which prevails in Westminster as to the pleading and assessment of damages, and to point out the cases in which the Court will review the decisions arrived at by a jury.

Damages in personal and mixed,

Damages are recoverable in all personal actions at common law; and so they are in mixed actions by the very definition of the latter, as being "suits wherein some real property is demanded, and also personal damages for a wrong sustained" (*a*). But no damages can be obtained in real actions. In these the plaintiff only claims title to real property, but not damages, and the Court cannot give the demandant that which he demands not. *Judex non reddat plus quam ipse*

but not in real actions,

(*a*) 3 Bl. Com. 118.

petens requirit (*b*). This exception was once very important, but since stat. 3 & 4 W. IV. c. 27, which, at one blow (*c*), swept away sixty-two real actions with barbarous names, it has become quite insignificant. Since that statute there are only two real actions left, viz., writ of right of dower, and ejectment. The latter action, too, in one instance assumes the form of a mixed action, when brought by landlord against tenant. In this case damages may be obtained for mesne profits (*d*). Quare impedit, and Dower unde nihil habet, are both mixed actions, in which damages may be obtained, as will be seen under those heads (*e*).

nor on an indictment.

No damages are recoverable on an indictment, or information, as the suit is maintained in the name of the king (*f*); and even where the statute gives damages to the person aggrieved, they cannot be obtained on the indictment, but must be sued for in an action on the statute, in the name of the party grieved (*g*). But an informer, upon conviction of the prisoner on any penal law, may have the third part of the fine the Court set upon him, according to the king's privy seal to that purpose (*h*).

Damages in actions on a penal statute;

Where a defendant is sued in debt upon a penal statute, several distinctions are taken as to his liability to damages for the detention of the penalty. Where the action is brought by a common informer, no damages can be obtained; because as he had no right to the money before the action was commenced, it cannot be said that it was detained from him. But it is otherwise where the penalty is given to the party grieved (*i*). In the latter case too the further distinction is taken, that when a statute gives a penalty certain, and also an action of debt, if the defendant does not pay on demand, but forces the plaintiff to a suit, he shall recover his damages, because the other did not pay the duty due by the statute

(*b*) 2 Inst. 286.

(*c*) S. 36.

(*d*) 15 & 16 Vict. c. 76, s. 214.

[(*e*) Dower, writ of right of dower and quare impedit, are now commenced by ordinary writs of summons with special indorsements, C. L. P. Act, 1860 (23 & 24 Vict. c. 126), s. 26.]

(*f*) 1 Roll. Abr. 220.

(*g*) 2 Hawk. P. C. c. 25, s. 3.

(*h*) *R.* v. *Gouer*, 1 Keb. 487.

(*i*) *North* v. *Musgrave*, 1 Roll. Abr. 574; *Frederick* v. *Lookup*, 4 Burr. 2018; *Cuming* v. *Sibly*, *ibid.* 2489.

upon demand. But where the penalty is uncertain, as treble damages, no damages are allowed for detention (*k*).

Where the action is against several for a penalty given by statute, only one penalty can be recovered against all. Although the words are, "that every person offending contrary thereto shall forfeit to the party aggrieved for every offence, &c.," yet the meaning is, that the penalty shall relate to the offence and not to the person (*l*).

Where a party persists in suing in an Ecclesiastical Court after a prohibition has been delivered, damages will be given, either in an action upon the prohibition, or upon attachment (*m*).

or a prohibition.

[The Court of Chancery may now, if it think fit, in cases where it has jurisdiction to entertain an application for an injunction or for specific performance, award damages to the party injured, either in addition to or in substitution for the injunction or specific performance (*n*).]

Damages in suits for injunction or specific performance.

(*k*) *North* v. *Wingate*, Cro. Car. 559; *Sedgwicke* v. *Richardson*, 3 Lev. 374.

(*l*) *Patridge* v. *Emson*, Noy, 62. [Where a penalty is imposed on a continuous offence, one penalty only is recoverable. *Garrett* v. *Messenger*, L. R. 2 C. P. 583; 36 L. J. C. P. 337. See *Apothecaries' Co.* v. *Burt*, 5 Ex. 363; 19 L. J. Ex. 334.]

(*m*) *Facy* v. *Lange*, Cro. Car. 559; *Heywood* v. *Foster*, 3 Lev. 360.

[(*n*) Chancery Amendment Act, 1858 (Lord Cairns' Act), 21 & 22 Vict. c. 27, s. 2.]

CHAPTER II.

1. *Nominal Damages.*
2. *General Principles in Actions on Contracts—on Torts.*
3. *Remote Damage—Costs of Actions.*
4. *Period for which Damages may be Assessed.*
5. *Reduction of Damages—Set-off.*

It was laid down in the preceding chapter that damages are recoverable in all personal actions; and not only may they be recovered, but they must necessarily be so in every case where the plaintiff is entitled to a verdict. The amount of course depends upon the nature of the action and the evidence. Where he gives no evidence of his loss, the damages must be nominal.

"Nominal damages mean a sum of money that may be spoken of, but has no existence in point of quantity" (*a*). Therefore, where a plaintiff sued in an inferior court of record for a debt of 50*l.*, which was the extent of its jurisdiction, and neither recovered nor sought to recover damages, except for the purpose of obtaining costs, it was held that nominal damages for this purpose did not place the debt beyond the jurisdiction (*b*).

Nominal damages where there is an injuria absque damno.

"Every injury imports a damage, though it does not cost the party one farthing; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them. So if a man give another a cuff on the ear, though it cost him nothing. . . . So a man shall have an action against another for riding over his ground, though it do him no

(*a*) *Per* Maule, J., 2 C. B. 499.
(*b*) *Joule* v. *Taylor*, 7 Exch. 58.

damage, for it is an invasion of his property, and the other has no right to come there" (*c*).

This rule applies equally whether the action is on a contract or for a tort. A few examples will illustrate it. Where the defendant, a banker, had refused to pay plaintiff's cheques, though he had funds in his hands, but no injury was proved, nominal damages were given (*d*). So where in an action by the creditor against the surety, it appeared that the principal debtor had indeed broken his agreement; but that the only injury accruing to the creditor arose from his own voluntary act, in making advances to which he was not bound (*e*). So nominal damages may be obtained for imitating the plaintiff's trade marks, or the wrappers in which his goods are made up (*f*); or for misrepresentations as to the condition of an insurance company, whereby the plaintiff was induced to effect an insurance with it (*g*); or for an infringement of any easement or right connected with land, though no injury is proved, or even alleged (*h*).

Cases in which absence of loss destroys right of action.

A distinction, however, must be taken here between what may be called absolute and relative rights. A man has an absolute right to have a promise performed, or to keep his estate inviolate; and he may sue and obtain nominal damages for an infringement of this right, although its maintenance is no benefit to him, and its violation no injury. But there are other rights which are merely relative to a particular benefit which the plaintiff is to reap from their enjoyment. The right and the benefit are co-extensive; and if the benefit is negatived the right ceases. An instance of this nature is the right which every man has to the services of a public officer. It is the duty of a sheriff to make a true return to a writ directed to him, and to arrest a debtor on mesne process.

(*c*) *Per* Holt, C. J., *Ashby* v. *White*, Ld. Raym. 938, 955.
(*d*) *Marzetti* v. *Williams*, 1 B. & Ad. 415.
(*e*) *Warre* v. *Calvert*, 7 A. & E. 143.
(*f*) *Blofeld* v. *Payne*, 4 B. & Ad. 410.
(*g*) *Pontifex* v. *Bignold*, 3 M. & G. 63.
(*h*) *Embrey* v. *Owen*, 6 Exch. 353; *Northam* v. *Hurley*, 1 E. &. B. 665; *Harrop* v. *Hirst*, L. R. 4 Ex. 43; 38 L. J. Ex. 1; *Medway Navigation Co.* v. *Earl of Romney*, 30 L. J. C. P. 236; 9 C. B. N. S. 575. So in an action against a railway company for non-fulfilment of an agreement to build accommodation works. *Brown* v. *Somerset and Dorset Ry. Co.*, 34 L. J. Ex. 152.] See *post*, as to injuries to easements, p. 341, *et seq.*

But this duty is only imposed upon him for the benefit of the creditor; and if he can absolutely negative the possibility of any advantage accruing to the latter from the performance of his duty, the plaintiff will not even be entitled to nominal damages (*i*). So in the case of an attorney. His employer has a right to his best services, and may sue him for negligence; but if the attorney can prove affirmatively that even his diligence would have been ineffectual, it is a bar to the action (*k*).

Damages not necessarily nominal where no actual injury.

Setting aside this exceptional class of cases, it may, however, be broadly stated that every infringement of a right involves a claim to nominal damages, though all actual damage is disproved. And, accordingly, in a suit for general average, in which a nonsuit was taken, because the jury were about to give a verdict for the defendant on the ground that they could not ascertain that any specific sum was the proportion due to the plaintiff, the court ordered a verdict to be entered for the plaintiff, with 6*d.* damages (*l*). It by no means follows, however, that in every such case only nominal damages are recoverable; this will be so when not only actual but contingent injury is negatived. But where there may be an injury, either existing at present, though unascertained, or to arise hereafter, and for which no fresh action could be brought, substantial damages may be given at once. As, for instance, in an action against a banker for not paying his customer's cheque (*m*); or on a covenant to pay off incumbrances (*n*), or a sum of money for which plaintiff was jointly liable with defendant to a third party (*o*). And so, too, in an action on the case for removing the support of plaintiff's house, though

(*i*) *Wylie* v. *Birch*, 4 Q. B. 566; *Williams* v. *Mostyn*, 4 M. & W. 145; [*Stimson* v. *Farnham*, L. R. 7 Q. B. 175; 41 L. J. Q. B. 52.] See *post*, p. 355, *et seq.*

(*k*) *Godefroy* v. *Jay*, 7 Bing. 413.

(*l*) *Feize* v. *Thompson*, 1 Taunt. 121. Where, however, in an action on an account stated, the fact of an account having been stated was proved, but the only evidence as to its amount was excluded, it was held by the Court of Queen's Bench (Erle, J., *contrà*) that the plaintiff must be nonsuited, on the ground that there cannot be a statement of an account without an item settled. *Lane* v. *Hill*, 18 Q. B. 252.

(*m*) *Rolin* v. *Steward*, 14 C. B. 595.

(*n*) *Lethbridge* v. *Mytton*, 2 B. & Ad. 772.

(*o*) *Loosemoore* v. *Radford*, 9 M. & W. 657.

at the time of the wrongful act no injurious consequence has followed (*p*).

Damages in debt.

Damages in debt are in general merely nominal, for its detention, and where the plaintiff has actually received payment of the debt he cannot afterwards commence an action for these damages (*q*).

We may now proceed to the more important inquiry, as to the general rules which determine the amount of substantial damages. It will be convenient to examine in order,

I. The principles upon which damages are given in actions of contract and tort.

II. What damage is inadmissible on the ground of remoteness.

III. The period of time in reference to which damages may be assessed.

IV. The cases in which evidence may be given to reduce damages.

Damages not a complete compensation.

I. The theoretical idea of damages is, that they are to be a compensation and satisfaction for the injury sustained (*r*). Practically, however, there can hardly ever be a case in which they are completely so. Take the simplest instance, viz., the non-payment of a debt. Put out of the question every element of mental suffering caused by the delay. There may be a clear amount of pecuniary loss flowing in the most direct manner from it. The creditor may become insolvent, and be permanently ruined. He may have to borrow money at an extravagant rate of interest. Even if nothing of the sort happens, still his taxed costs of suit never repay him for the amount he has expended in the action; for none of this, however, can he be compensated. The amount of the debt, with interest, and taxed costs is all he can recover. And so if the defendant's negligence cause him the loss of a limb. The

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(*p*) *Nicklin* v. *Williams*, 10 Exch. 259. [The judgment upon which the statement in the text is based has been qualified by late decisions. There must be some damage, otherwise there is no cause of action. *Backhouse* v. *Bonomi*, 9 H. L. Cases, 503; 34 L. J. Q. B. 181; *Smith* v. *Thackerah*, L. R. 1 C. P. 564; 35 L. J. C. P. 276. In reality, however, in *Nicklin* v. *Williams*, some actual damage had been sustained. See per Willes, J., *Bonomi* v. *Backhouse*, in Ex. Ch., E. B. & E., at p. 658; 28 L. J. Q. B. at p. 381.]

(*q*) *Beaumont* v. *Greathead*, 2 C. B. 494. See more fully upon this point, *post*, p. 161, *et seq.*

(*r*) 2 Bl. Com. 438.

diminution of his future enjoyment of life can, of course, never be made up to him by money; but the injury may even make it utterly impossible for him to continue his profession. Yet the jury could not in such a case award a successful surgeon such a sum as would purchase an annuity equal to his earnings.

Rule in actions of contract.

In the case of contract the measure of damages is much more strictly confined than in cases of tort. As a general rule, the primary and immediate result of the breach of contract can alone be looked to. Hence, in the case of non-payment of money, no matter what the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest of the money only (*s*). So where the contract is to deliver goods, replace stock, or convey an estate, the profit which the plaintiff might have made by the resale of the matter in question cannot in general be taken into account; nor the loss which he has suffered from the fact of his ulterior arrangements, made in expectation of the fulfilment of the bargain, being frustrated (*t*). The principle of all these cases seems to be, that, in matters of contract, the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance. Now this benefit, the consideration for his promise, is always measured by the primary and intrinsic worth of the thing to be given for it, not by the ultimate profit which the party receiving it hopes to make when he has got it. A bottle of laudanum may save a man his life, or a seat in a railway carriage may enable him to make his fortune; but neither is paid for on this footing. The price is based on the market value of the thing sold. It operates as a liquidated estimate of the worth of the contract to both parties. It is obviously unfair, then, that either party should be paid for carrying out his bargain on one estimate of its value, and forced to pay for failing in it on quite a different estimate. This would be making him an insurer of the other party's profits, without any premium for undertaking the risk.

The law on the subject of damages where there has been

(*s*) *Per* Willes, J., *Fletcher* v. *Tayleur*, 17 C. B. p. 29; [*Per* Bovill, C. J., *British Columbia Saw Mill Co.* v. *Nettleship*, L. R. 3 C. P. at p. 506; 37 L. J. C. P. at p. 240. See also *Duckworth* v. *Ewart*, 2 H. & C. 129; 33 L. J. Ex. 24; and *Prehn* v. *Royal Bank of Liverpool*, *post*, p. 20.]

Hadley v. Baxendale.

a breach of contract, has been much considered lately, and laid down with great fulness by the Court of Exchequer. The case arose out of the following facts:

The plaintiffs were owners of a steam-mill. The shaft was broken, and they gave it to the defendant, a carrier, to bring to an engineer, to serve as a model for a new one. On making the contract, the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately. He delayed its delivery, the shaft was kept back in consequence; and in an action for breach of contract they claimed as specific damages the loss of profits while the mill was kept idle. It was held that if the carrier had been made aware that a loss of profits would result from delay on his part, he would have been answerable. But as it did not appear he knew that the want of the shaft was the only thing which was keeping the mill idle, he could not be made responsible to such an extent (*t*). The Court said, "We think the proper rule in such a case as the present is this:—where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by

(*t*) *Hadley* v. *Baxendale*, 9 Exch. 341, 354; 23 L. J. Ex. 179, 182.

any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

The principles laid down in the above judgment, that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and that no consequence, which is not the necessary result of a breach, can be supposed to have been so contemplated, unless it was communicated to the other party, are of course clearly just. But it may be asked with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be held answerable for them, and consented to undertake such a liability? In all probability, if the carrier had been told that any delay in delivering the shaft would make him liable to pay the whole profits of the mill, he would have required an additional rate of recompense before facing such a responsibility. The question comes to this. The law says that every one who breaks a contract shall pay for its natural consequences, and in most cases states what those consequences are. Can the other party by merely acquainting him with a number of further consequences, which the law would not have implied, enlarge his responsibility to the full extent of all those consequences, without any contract to that effect? No doubt it may be said that it was in the power of the defendant to have expressly refused such responsibility. True. But ought not the onus of making a contract rather to lie on the party who seeks to extend the liability of another, than upon him who merely seeks to restrain his own within its original limits? (*u*).

The rule laid down in *Hadley* v. *Baxendale* was acted upon in a very recent case (*x*). The defendant had con-

[(*u*) See in confirmation of this view, *British Columbia Saw Mill Co.* v. *Nettleship*, per Willes, J., *post*, p. 18.]

(*x*) *Fletcher* v. *Tayleur*, 17 C. B. 21, 25 L. J. C. P. 65.

tracted to build a ship, which was to be delivered to the plaintiff on the 1st of August, 1854. It was not delivered till March, 1855. The vessel was intended by the plaintiffs, —and from the nature of her fittings the defendants must have known the fact,—for a passenger ship in the Australian trade. Evidence was given that freights to Australia were very high in July, August, and September, but fell in October, and continued low till May, when the vessel sailed; and that had she been delivered on the day named, she could have earned 2750*l.* more than she did. On the other hand it was shown, that the plaintiffs would have extended the time for delivery till the 1st October, if the defendants would have bound themselves to that day under a demurrage (which however was refused); and that they had stated as their reason for wishing to have the ship then, "that after that time the days would be shortening so fast, that they would be seriously inconvenienced and prejudiced in fitting the vessel out." The judge charged in the words of *Hadley* v. *Baxendale*, and the jury found a verdict of 2750*l.* An attempt was made to set aside the verdict for excess of damages, on the ground that if the plaintiff's offer had been complied with, the loss of freight would have been suffered; and that the damages should be measured rather by the species of loss which they had themselves pointed out, than by that which they afterwards set up. The rule was refused.

This case clearly does not go as far as *Hadley* v. *Baxendale*. The primary object of the ship was to earn freight by carrying passengers. The defendant was to be paid the value of such a ship. Any delay in its completion would clearly subject it to a diminution in value by a fall in freight. The measure of that diminution in value was accurately expressed by the difference in profits obtained on the first voyage. But suppose the plaintiff had told the defendant that he intended to send out his own goods in it to the Australian market, and that, in consequence of the delay, the goods had sold under prime cost, could the defendant have been charged with a loss which arose, not from any depreciation in the value of the ship, for which he had contracted, but in the value of goods, with which he had no connection?

It may be observed also that *Fletcher* v. *Tayleur* is by no

means a decision in affirmance of *Hadley* v. *Baxendale*. The principles laid down in the Exchequer were not even discussed in the C. B., on the express ground that the ruling of the learned judge had been acquiesced in on both sides at the trial.

New rule of damages suggested by Court of C. B.

The same case was remarkable for the suggestion of a new principle in the assessment of damages thrown out by Jervis, C. J., and Willes, J. The latter said, "It certainly is very desirable that these matters should be based upon certain and intelligible principles, and that the measure of damages for the breach of a contract for the delivery of a chattel should be governed by a similar rule to that which prevails in the case of a breach of a contract for the payment of money. No matter what the amount of inconvenience sustained by the plaintiff, in the case of non-payment of money, the measure of damages is the interest of the money only; it might be a convenient rule if, as suggested by my lord, the measure of damages in such a case as this was held, by analogy, to be the average profit made by the use of such a chattel" (*y*). Such a rule as this would plainly have the same effect of excluding all uncertain ulterior profits as that contended for above. It would, however, still leave the same question open as that in *Hadley* v. *Baxendale*. Where the chattel was itself only part of something else which was rendered useless for want of it, should the profit of the entire chattel be recovered? If a vessel were delayed in port for want of a bowsprit, should a loss of freight, to the amount, perhaps, of thousands of pounds, be obtained in damages? It would, of course, in such a case be essential to show that no other could have been obtained elsewhere. But it may be a further question, whether a person who is under no obligation to enter into a contract entailing so great a responsibility, should be answerable to such an extent, without consideration, unless upon a clear understanding to that effect.

(*y*) 17 C. B. 29. See 25 L. J. C. P. 66. [In *Ex parte Cambrian Steam Packet Co.*, L. R. 4 Ch. at p. 117, Lord Cairns, C., said that he had proceeded on the principle that if a profit would arise from a chattel, and it is left with a tradesman to repair, and detained by him beyond the stipulated time, the measure of damages is *primâ facie* the sum which would have been earned in the ordinary course of employment of the chattel in the time. So in the Court below, Giffard, V. C., L. R. 6 Eq. at p. 408; 37 L. J. Ch. at p. 690.]

[The rule laid down in *Hadley* v. *Baxendale* was intended to settle the law (*a*), and it has been accepted both in England and America (*b*). It presents an alternative. The damages must be either such as may fairly and reasonably be considered as arising naturally, *i.e.*, "according to the usual course of things from such breach of contract itself," or, "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it." In many cases these amount to the same thing, and Blackburn, J., on a recent occasion summarized the rule by saying, "The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of" (*c*).

Some of the reported cases in which the rule has been discussed may usefully be noticed here. The question most frequently has been whether the damages came within the second branch of the rule, as having been in the contemplation of the parties.

The first of them, *Portman* v. *Middleton* (*d*), was a clear case. The plaintiff had undertaken to repair a steam threshing-machine for a third person by harvest time. For this purpose he required a new fire-box. The defendant undertook to make him one in a fortnight; but the plaintiff did not tell him of his own contract to repair the threshing machine. The defendant made default in delivering the fire-box, and the plaintiff in consequence was unable to perform his contract, and was sued by the owner of the threshing machine and obliged to pay him compensation. This compensation he sought to recover from the defendant, but failed, because it could not have been in the contemplation of the defendant when he made his contract with the plaintiff; and was not the ordinary consequence of the breach.

[(*a*) See *per* Pollock, C. B., *Wilson* v. *Newport Dock Co.*, L. R. 1 Ex. at p. 189; 35 L. J. Ex. at p. 103.]

[(*b*) The leading case in America is *Griffin* v. *Colver*, 16 N. Y. 489, where the rule was stated to be that "the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."]

[(*c*) *Cory* v. *Thames Iron Works Co.*, L. R. 3 Q. B. at p. 186.]

[(*d*) 4 C. B. N. S. 322; 27 L. J. C. P. 231.]

The next, *Smeed* v. *Foord* (*e*), in which the rule was adopted by the Court of Queen's Bench, was more complicated. The defendant contracted to deliver to the plaintiff a threshing machine. He knew that the plaintiff's practice was to thresh his wheat in the field. The defendant made default, and the result was that the plaintiff, who could not get a machine elsewhere, was obliged to carry the wheat and stack it. While stacked it was injured by rain, and after being threshed it had to be kiln-dried. It was then sold, but fetched less than it would have done but for the delay, the market price of wheat having fallen in the meantime. It was held that both parties must have foreseen that if the machine were not delivered the wheat must be stacked, and injury from weather would probably result; and, therefore, that the plaintiff was entitled to recover the expenses of stacking the wheat, the loss arising from its deterioration by rain, and the expense of drying it, but not the loss arising from the fall in the market price, because the latter was not the natural result of the breach of contract, nor could it have been contemplated when the contract was made. For aught that the parties knew, or that might naturally have happened, the price might have risen instead of fallen.

In *Gee* v. *Lancashire and Yorkshire Railway Company* (*f*), the defendants, who were carriers, delayed forwarding some cotton to the plaintiffs' mill, which in consequence was stopped. There had been no notice at the time of delivery to the defendants that any particular inconvenience would be likely to result from delay. The plaintiffs were held not to be entitled to recover for loss of profits from the mill standing idle, nor the amount paid for wages during the time. The loss was in fact sustained, not in consequence of the non-arrival of the cotton alone, but in consequence of that fact and of the plaintiffs having no other cotton in stock; the latter being a fact which the defendants were not bound to expect. A suggestion was thrown out by Bramwell, B., that to the rule laid down in *Hadley* v. *Baxendale* a qualification might perhaps be added, that in the course of the performance of a con-

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[(*e*) 1 E. & E. 602; 28 L. J. Q. B. 178.]
[(*f*) 6 H. & N. 211; 30 L. J. Ex. 11.]

tract one party might give notice to the other of any particular consequence which would result from the breaking of the contract, and then have a right to say,—"If you, after that notice, persist in breaking the contract, I shall claim the damages which will result from the breach." In *Wilson* v. *Lancashire and Yorkshire Railway Company* (*g*), the plaintiff, a cap manufacturer at Cockermouth, bought cloth at Huddersfield, for the purpose of making it up into caps, which he was in the habit of selling through the country by travellers. The cloth was delivered to the defendants for carriage to Cockermouth, and was delayed by them so long that the plaintiff did not receive it in time to manufacture it into caps, the season having passed before he could execute the orders obtained by his travellers. He claimed damages for the loss of his season. It was held that he was entitled to them, assuming the loss of the season to mean not the loss of the profits which he would have made by the sale of the caps, but the diminished value of the cloth to him, by reason of its delivery at the end of the season instead of at the beginning.

In *Collard* v. *South Eastern Railway Company* (*h*), hops sent by the plaintiff to London for sale were delayed and damaged by the defendants, and in the interval, between the time when they ought to have been delivered and the time when they became available for sale, the market price for hops fell. The plaintiff was held entitled to recover the loss which he had sustained, as being the direct, immediate, and necessary consequence of the defendants' breach. A distinction was suggested in this case between it and *Smeed* v. *Foord*, that in the latter the damage disallowed was consequential on the plaintiff's not being able to use the threshing machine, whereas in the former the subject matter of the contract was damaged, and the damage was direct.

In *Great Western Railway Company* v. *Redmayne* (*i*), an unsuccessful attempt was made to recover damages on the authority of the cases which have just been mentioned. The plaintiff sent goods by the defendants' railway to his traveller at Cardiff, but through the defendants' negligence they did

[(*g*) 9 C. B. N. S. 632; 30 L. J. C. P. 232.]
[(*h*) 7 H. & N. 79, 30 L. J. Ex. 393.]
[(*i*) L. R. 1 C. P. 329.]

not arrive till after the traveller had left. The plaintiff sought to recover the profits which he would have derived from a sale of the goods at Cardiff, on the principle that the market value to him, for the purposes of sale, was diminished after the departure of the traveller by the amount of the profit that would have been gained by a sale there; but it was held, that the market value of the goods was their value in the market independently of any circumstances peculiar to the plaintiff, and that the profits which would have been made by the sale at Cardiff, through the traveller being present, could not be recovered.

In the recent case of *Cory* v. *Thames Ironworks Company* (*k*), a difficulty arose in applying the rule in *Hadley* v. *Baxendale*, because the parties had not in contemplation the same use for the article to be supplied, which was of a novel character. The defendants had built a large floating boom derrick, fitted with machinery for raising sunken vessels, for a company which had become insolvent, and had left it on their hands. The plaintiffs agreed to buy the hull of the derrick, which the defendants were to empty of machinery, and deliver at a time fixed. The plaintiffs, who were coal merchants, intended to place in the hull hydraulic cranes for the purpose of trans-shipping their coals direct from colliers into barges. This purpose was entirely novel and unknown to the defendants. They believed that the plaintiffs intended to use the hull for a coal store, which was the most obvious use to which such a vessel was capable of being applied by persons in the coal trade; but the derrick being an entirely novel and exceptional vessel, and the first of the kind built, no vessel of the sort had ever been applied to such a purpose. She was capable, however, of being profitably employed for that purpose, and had she been so employed, her non-delivery at the time fixed would have caused loss and damage to the plaintiffs to the amount of 420*l*. As it was, the plaintiffs experienced a much greater loss, for they had purchased machinery and steam tugs to be used in conjunction with the hulk, and these lay idle for a considerable time. The plaintiffs, therefore, lost the interest upon the moneys expended, and, also, the profits which they would have made by the use

[(*k*) L. R. 3 Q. B. 181; 37 L. J. Q. B. 68.]

of the derrick. The chief contention was as to whether the defendants were liable to pay the 420*l.* It was apparent that the plaintiffs could not recover the larger damages, the special purpose to which they had intended applying the derrick not having been made known to the defendants; but it was further urged for the defendants, that to give the plaintiffs the 420*l.* would be to give them damages for what they had not suffered, nor even contemplated suffering, namely, being deprived of the use of the derrick as a coal store. The result, however, of this reasoning would have been, that when the buyer intended to apply a thing to a purpose which would make the damages greater, and did not intend to apply it to the purpose to which the seller supposed he intended to apply it, the seller would be set free altogether. The Court held that the sellers, having contemplated that the derrick was to be employed in what was in fact the most obvious mode of earning money, and the plaintiffs having lost more money than they would have lost if they had so employed it, they were entitled to be compensated to that extent, the loss having been the natural consequence of the non-delivery of the derrick.

That the rule laid down in *Hadley* v. *Baxendale* may not decide every case of breach of contract had been said by Crompton, J., in *Smeed* v. *Foord* (*l*), and by Wylde, B., in *Gee* v. *Lancashire and Yorkshire Railway Company* (*m*). The Court of Exchequer found a difficulty in applying it to the exceptional circumstances presented in *Wilson* v. *Newport Dock Company* (*n*).

There the defendants had contracted to receive the plaintiff's ship into their dock at a specified time, and having given him notice that they could then receive her she was brought to the dock in ballast. Owing to the breaking of one of the chains of the dock-gates, the defendants were unable to let her in. The captain anchored outside the gates, and at the turn of the tide she grounded and broke her back. The jury could not agree as to whether the ship could have been taken to a place of safety, but they agreed that there was no negligence on the part of the captain. There was a con-

[(*l*) 1 E. & B. at p. 616; 28 L. J. Q. B. at p. 183.]
[(*m*) 6 H. & N. at p. 220; 30 L. J. Ex. at p. 18.]
[(*n*) L. R. 1 Ex. 177; 35 L. J. Ex. 97.

siderable discussion as to whether the damage was too remote, and eventually a new trial was directed in order that the question upon which the jury had disagreed might be settled. Pollock, C. B., however, said of the rule in *Hadley* v. *Baxendale*, "that it is not applicable to and does not decide every case;" and Martin, B., who, differing from the rest of the Court, thought that the plaintiff was entitled to the verdict, expressed a strong opinion that the rule laid down in *Hadley* v. *Baxendale*, was only applicable to cases of a similar character, while to others the general rule must be applied: "That the damage to be compensated for ought to be proximate to, and not remote from, the breach of contract or the wrong, and ought fairly and reasonably and naturally to arise from them."

The case of *British Columbia Saw Mill Company* v. *Nettleship* (*o*), is important as bearing upon the point suggested above (*p*), that a mere communication of the consequences of a breach of the contract is not sufficient to enlarge the responsibility of the party to whom it is made. The plaintiffs delivered to the defendant for carriage to Vancouver's Island several cases of machinery intended for the erection of a saw mill. The defendant knew generally that the cases contained machinery. On the arrival of the vessel at her destination, one of the cases which contained parts of the machinery, without which the mill could not be erected, was missing. The plaintiffs were obliged to replace those parts from England, at a cost, including freight, of 353*l.* 17*s.* 9*d.*, and with a delay of twelve months. A fair rate of hire of the machinery applied to the purposes for which it was required by the plaintiffs, would have been for twelve months 2646*l.* 2*s.* 3*d.*, which amount the plaintiffs sought to recover. Their claim, however, to this sum was disposed of by the second branch of the rule in *Hadley* v. *Baxendale*, the defendant not having known that the case contained portions of the machinery which could not be replaced at Vancouver's Island, and without which the rest could not be put together. But Willes, J., discussed the effect of knowledge in the following terms: "I am disposed to take the narrow view, that one of two contracting parties

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[(*o*) L. R. 3 C. P. 499; 37 L. J. C. P. 235.]
[(*p*) *Ante*, p. 10.]

ought not to be allowed to obtain an advantage which he has not paid for. The conclusion at which we are invited to arrive would fix upon the ship-owner, beyond the value of the thing lost and the freight, the further liability to account to the intended millowners, in the event of a portion of the machinery not arriving at all, or arriving too late, through accident or his default, for the full profits they might have made by the use of the mill if the trade were successful and without a rival. If that had been presented to the mind of the ship-owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And, though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. Several circumstances occur to one's mind in this case to show that there was no such knowledge on the defendant's part which would warrant the conclusion contended for by the plaintiffs. In the first place, the carrier did not know that the whole of the machine would be useless if any portion of it failed to arrive, or what that particular part was. And that suggests another consideration. He did not know that the part which was lost could not be replaced without sending to England. And, applying what I have before suggested, if he did know this, he did not know it under such circumstances as could reasonably lead to the conclusion that it was contemplated at the time of the contract that he should be liable for all those consequences in the event of a breach. Knowledge on the part of the carrier is only important if it forms part of the contract. It may be that the knowledge is acquired casually from a stranger, the person to whom the goods belong not knowing or caring whether he had such knowledge or not. Knowledge, in effect, can only be evidence of fraud, or of an

understanding by both parties that the contract is based upon the circumstances which are communicated."

The Court considered the plaintiffs entitled to recover the sum necessarily expended in replacing the lost box of machinery, and the freight, and interest upon the amount for the time the plaintiffs were delayed, the interest being apparently given by way of compensation for the delay upon the analogy of the practice of allowing interest in the case of non-payment of money.

In a recent case in the Court of Exchequer the rule was applied in an action for damages resulting from the non-payment of money under a special contract to do so. The defendants, bankers at Liverpool, undertook to accept the drafts of the plaintiffs' Alexandria firm, the plaintiffs undertaking to put them in funds to meet the bills at maturity and the defendants receiving ½ per cent. for the accommodation. Bills were accepted under this arrangement, and the plaintiffs duly provided the defendants with funds. Before the bills became due the defendants stopped payment and gave notice to the plaintiff that they would be unable to meet the bills. The plaintiffs arranged with another house at Liverpool to take up the bills, paying 2½ per cent. commission. They were also obliged to pay to the holders the expenses of protesting the bills, and incurred expenses in telegraphic communication between Liverpool and Alexandria. In an action for breach of the contract to pay the bills out of the funds provided, it was urged on behalf of the defendants that this was a mere case of non-payment of money, and that the damages should be limited to the amount of the bills and interest. But the Court held that the ordinary rule applicable to damages for non-payment of a debt or bill was not applicable, and there being a special contract the damages reasonably flowing from its breach might be recovered, and the plaintiffs were therefore entitled to the commission which they had paid and the telegraphic and notarial expenses. Kelly, C. B., seems to have considered the damage as within the contemplation of the parties, but Martin, B., protested against this test, as he has done on many occasions, on the ground that parties, when they make contracts, contemplate fulfilling them and not breaking them. There was a difference of opinion also as to whether

the plaintiffs were entitled to their damages as general or special damage (*q*).]

Question whether motive can be a ground of damage in actions on contract?

With the single exception of actions for breach of promise of marriage, I am not aware of any cases in which it has been held in England that the motives or conduct of a party breaking a contract, or any injurious circumstances not flowing from the breach itself, could be considered in damages where the action is on the contract. It frequently happens that circumstances of malice, fraud, or violence give rise to an action of tort as an alternative remedy; but where the plaintiff chooses to sue upon the contract, he lets in all the consequences of that form of action (*r*). It has been held, indeed, in an action for money had and received, by assignees in bankruptcy, for the proceeds of a bill lodged with the defendants by the bankrupt in order to be discounted, that evidence of a fraudulent appropriation of it before bankruptcy would preclude their set-off (*s*). But here the evidence went, not to increase the damages, but to show that the counter claim was not a case of mutual credit within the statute (*t*). In America, however, the contrary doctrine has been laid down in the State of South Carolina, but is strongly combated by Mr. Sedgwick (*u*). So it is said by Mr. Chitty (*v*) that "there are some cases in which the defendant may be regarded in the light of a wrong-doer in breaking his contract; and where this is the case, a greater latitude is allowed to the jury in assessing the damages." The case cited in support of this statement is that of *Lord Sondes* v. *Fletcher* (*w*). It was an action on a bond to resign a living, and the only question was as to the amount of damages. The defendant's life interest was worth ten years' purchase, while that of the party to whom the plaintiff intended to present was worth fourteen. The jury found the latter amount. The Court said, "We are

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[(*q*) *Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Ex. 92; 39 L. J. Ex. 41. See for another instance of special damage recovered in a somewhat similar case for breach of a contract to meet drafts, *Boyd* v. *Fitt*, 14 Ir. Com. L. Rep. 43.]

(*r*) *Thorpe* v. *Thorpe*, 3 B. & Ad. 580.

(*s*) *Buchanan* v. *Findlay*, 9 B. & C. 738.

(*t*) *Per* Parke, B., 3 B. & Ad. 585.

(*u*) Sedg. Dam. 207—212, [p. 231, *et seq.*, 4th ed.]

(*v*) Contracts, 830, 9th ed.

(*w*) 5 B. & A. 835.

not prepared to say that the jury in this case have formed a wrong estimate of the damages, for the defendant, having entered into a bond to do a particular thing, which he has refused to do, is a wrong-doer, and he is not to be permitted to estimate the value of the living as if he were the purchaser of it. Besides, it appeared that the defendant had it in his power to relieve himself from this verdict by resigning the living; and if he does not do that, it is clear that he considers the damages found by the jury as less than the value of the living to him."

We may observe upon this case, first, that the fact of the defendant being a wrong-doer introduced no *new* element of damage. It only affected the valuation put upon that damage by the jury. But, secondly, it seems the jury were strictly right. The value of the living to its occupant would be measured by the probable length of his own life, but the value to the owner of the advowson would be measured by the life of the person to whom he intended to present; because, if he sold it, this would determine the purchase money, and if he gave it away, this would determine the value of the gift. It may be said, that still it was only during the occupant's life that the owner would be kept out of his right of presentation. No doubt; but the incumbent might outlive the owner, in which case he would never come into his right, or the person to whom he intended to present, in which case his object would be defeated. Besides, the present object was to confer the living upon another person. The value of the presentation was its value to that person. The damages for defeating this object might fairly be set at the amount which that person would have to receive, in order to be an equivalent to him for the living. Thirdly, the concluding observation puts the matter beyond doubt, as it shows what the incumbent himself thought upon the matter.

There is another apparent exception to the rule that in actions for breach of contract the motives and conduct of the defendant cannot affect the damages. I allude to the case of contracts for the sale of land, in which it is held that where the defendant bonâ fide and reasonably believed that he had a good title, no damages can be recovered for the loss of profit which the plaintiff has sustained in not having the contract

fulfilled, but that it is otherwise where he contracted to convey without a shadow of title (*x*). On examination, however, it will be found that the damages in this case are not a penalty inflicted upon him for a fraud, but merely the result of his case being restored to the old common law rule, and removed out of the exception engrafted upon it in respect of sales of real property. The rule is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. The exception is, that when a person contracts to sell real property there is an implied understanding that if he fail to make a good title, the only damages recoverable are the expenses he has been put to in investigating the title. But this exception does not apply where he had no title at all (*y*).

Rule of damages in actions of tort.

Actions of tort, as we have observed before, are governed by far looser principles. Even here, however, in many cases, the measure of damages is as accurately ascertainable as in actions on a contract. Torts are divisible into three classes: injuries to the property, person, or character. Those of the former class may be mingled with ingredients which will enhance the damages to any amount. For instance, a man's goods may be seized under circumstances which involve a charge of a criminal nature (*z*); or a trespass upon land may be attended with wanton insult to the owner (*a*). Any species of aggravation will of course give ground for additional damages. In general, however, injuries to property, when unattended by circumstances of this sort, and especially when they take place under a fancied right, are only visited with damages proportioned to the actual pecuniary loss sustained. On the other hand, where the person or character is injured, it is difficult, if not quite impossible, to fix any limit, and the verdict is generally a resultant of the opposing forces of the counsel on either side, tempered by such moderating remarks as the judge may think the occasion requires. It must not be supposed, however, that even cases of this sort are quite

(*x*) *Robinson* v. *Harman*, 1 Exch. 850, *post*, p. 135, *et seq.*
(*y*) 1 Exch. 855.
(*z*) *Bracegirdle* v. *Orford*, 2 M. & S. 77.
(*a*) *Merest* v. *Harvey*, 5 Taunt. 442.

beyond rule. If it were so, there could be no such things as new trials for excessive damages. The difference is, that in cases of contract, and in some cases of tort to the property, a rule can be applied to the facts so accurately as to make the amount a mere matter of calculation. In the other class of offences, the rule goes no further than to point out what evidence may be admitted, and what grounds of complaint may be allowed for. But when this is done, the amount of damages is entirely in the disposition of the jury. A new trial will only be granted when the verdict is so large as to satisfy the Court that it was perverse and the result of gross error; and to prove that the jury have acted under the influence of undue motives or misconception (*b*).

Motive admissible as an element in assessing damages.

One marked distinction between actions of contract and tort is, that in the former, as we have seen, evidence of malicious motive is not admissible, in the latter it is (*c*). There are indeed some observations of Pollock, C. B., in a later case (*d*), where he expressed a doubt whether the motive of the defendant had any bearing upon the matter, and said that the plaintiff was only entitled to compensation in proportion to the injury he had received. It was not necessary, however, to decide the point in the particular case, which merely established that in an action against two, the motive of one cannot be matter of aggravation against the other (*e*). It is conceived that the practice against which the dictum in question was directed is too firmly settled, both by reason and precedent, to be overthrown; in fact it could not be overthrown without destroying at the same time that large class of actions in which malice is the whole gist of the offence. Where a party has been arrested, sued, or prosecuted without cause, the injury is clearly the same to him, whether the act be malicious or not. Yet, unless malice be not only alleged but proved, an action for the arrest, &c., will not be maintainable (*f*). If then malice can render an innocent

(*b*) *Gough* v. *Farr*, 1 Y. & J. 477.

(*c*) *Sears* v. *Lyons*, 2 Stark. 317; *Pearson* v. *Lemaitre*, 5 M. & G. 700; *Warwick* v. *Foulkes*, 12 M. & W. 507; *per* Pollock, C. B., 13 M. & W. 51.

(*d*) *Clark* v. *Newsam*, 1 Exch. 131, 139.

[(*e*) Nor ought the motive of an agent to be matter of aggravation against the principal. *Carmichael* v. *Waterford and Limerick Ry. Co.*, 13 Ir. L. R. 313.]

(*f*) *Reynolds* v. *Kennedy*, 1 Wils. 233; *De Medina* v. *Grove*, 10 Q. B. 152.

act wrongful, *à fortiori* it must render a wrongful act more wrongful, and therefore be proveable in aggravation of damages.

This seems to decide an important question, viz., whether damages are a compensation or a punishment. In cases of contract, as we have seen, they are only a compensation, and frequently a very inadequate one. In cases of tort to the property, where there are no circumstances of aggravation, they are generally the same, as will be seen hereafter (*g*). Where the injury is to the person, or character, or feelings, and the facts disclose fraud, malice, violence, cruelty, or the like, they operate as a punishment, for the benefit of the community, and as a restraint to the transgressor.

Inquiry whether damages in cases of tort are a compensation or a penalty?

It must be admitted that many expressions are to be found in which judges have directed juries merely to give a compensation to the plaintiff. In one instance, Alderson, B., refused in an action of crim. con. to allow evidence of the defendant's property with a view to increased damages, saying that it was not a question in the cause (*h*). As a matter of practice there is no doubt that juries always measured their damages in such cases by the condition of the defendant; and the practice was expressly sanctioned by the authority of Buller, J. (*i*), who said that in crim. con. the condition of the defendant, and his being a man of substance, were proper circumstances of aggravation. This would have been absurd if damages were only a payment for an injury; but if they were a penalty for a wrong, it would be quite just, because the penalty must be proportioned to the means of the offender. So the numberless cases in which damages, totally disproportioned to the actual harm inflicted, have been given and sanctioned where the act was of a grossly unconstitutional nature, or attended with studied insult (*j*), can only be accounted for on the same principle; accordingly we find Wilmot, C. J., saying in a case of seduction, "Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of 20*s*., yet the jury have

(*g*) See *post*, c. xiii.
(*h*) *James* v. *Biddington*, 6 C. & P. 590.
(*i*) B. N. P. 27.
(*j*) See various instances, *post*, p. 457, *et seq.*

done right in giving liberal damages" (*k*). And the same doctrine, that damages may in such cases be inflicted "for example's sake, and by way of punishing the defendant," has been repeatedly laid down in America, and is sanctioned by the high authority of Kent, C. J., and Story, J. (*l*). In fact, if any other rule existed, a man of large fortune might, by a certain outlay, purchase the right of being a public tormentor. He might copy the example of the young Roman noble mentioned by Gibbon, who used to run along the Forum striking every one he met upon the cheek, while a slave followed with a purse, making a legal tender of the statutory shilling!

Damage must not be too remote.

II. Having examined the principles by which the assessment of damages is governed, we have next to inquire, what grounds of damage will in no case be admissible. These grounds may be classed under the general head of remoteness. Damage is said to be remote, when, although arising out of the cause of action, it does not so immediately and necessarily flow from it, as that the offending party can be made responsible for it.

In pursuing this investigation several decisions will be cited which may, at first sight, appear not strictly in point. I refer to that class of cases in which special damage is necessary for the maintenance of the action, and in which the contest has been as to its sufficiency for that purpose. It is clear, however, that any circumstances of injury to the plaintiff which are so closely identified with the conduct of the defendant, as to make it actionable where it would otherwise be innocent, must, *à fortiori*, be capable of being taken into consideration in estimating the amount of damage his conduct has produced. The converse of the proposition may not always be logically correct. In general, however, it will be found that where

(*k*) *Tullidge* v. *Wade*, 3 Wils. 18. [Where a railway company had obstructed a siding belonging to an adjoining landowner with a high hand and in violation of his rights under an Act of Parliament, Willes, J., and Byles, J., were of opinion that exemplary damages might justly be given; the latter saying, "Where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into consideration and giving retributory damages." *Bell* v. *Midland Railway Co.*, 10 C. B. N. S. 287, see at p. 308; 30 L. J. C. P. 273. And liberal damages were allowed to be given against one who negligently and recklessly pulled down buildings on his own land, so as to injure his neighbour, with a view to make him give up possession. *Emblen* v. *Myers*, 6 H. & N. 54; 30 L. J. Ex. 71.]

(*l*) Sedg. Dam. 459—464, where the decisions are cited, [p. 525, *et seq.*, 4th ed.]

damage is too remote to form the ground of an action, the reason of the decision would equally exclude it from consideration, though the suit were maintainable on other grounds.

General principle.

The first, and in fact the only inquiry, in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character if it can be shown to be such a consequence, as in the ordinary course of things, would flow from the act, or, in cases of contract, if it appears to have been contemplated by both parties (*m*). Where neither of these elements exists, the damage is said to be too remote (*n*).

When profits may be allowed for;

One very common instance in which damages are held to be too remote arises where the plaintiff claims compensation for the profits which he would have made, if the defendant had carried out his contract. It is by no means true, however, that such profits can never form a ground of damage (*o*). There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of that profit is strictly the measure of damages. When A. agrees to execute work for B., or to sell him goods, or hire him a ship at a future day, the benefit to A. is the profit flowing from the transaction, and to this he is entitled.

and when not.

But when the thing purchased is a specific article, and not the right to make a profit, the measure of damages will be the value of that article, or the difference between the con-

(*m*) *Hadley* v. *Baxendale*, 9 Exch. 341; 23 L. J. Ex. 179. See *ante*, p. 9.

[(*n*) In *Hoey* v. *Felton*, 11 C. B. N. S. 142; 31 L. J. C. P. 105, Erle, C. J., cites the text in support of the judgment of the court, and says that damage will be too remote unless it immediately and according to the common course of events follows from the defendant's wrong, and the two are known by common experience to be usually in sequence. In *Williams* v. *Reynolds*, 6 B. & S. 495; 34 L. J. Q. B. 221, Crompton, J., also adopts this passage in the text.]

[(*o*) In cases of infringement of patent or unlawful use of trade mark, loss of profits forms the substantial ground for the claim of compensation. It has been decided that special damage, by loss of custom or otherwise, must be proved, where a trade mark has been used; and it cannot be assumed that the goods sold by the defendant would have been sold by the plaintiff, but for the defendant's unlawful use of his trade mark. *Leather Cloth Co.* v. *Hirschfield*, L. R. 1 Eq. 299. On the other hand, every sale of a patented article must be a damage to the patentee, see per Page Wood, V. C., *Davenport* v. *Rylands*, L. R. 1 Eq. 302, where the difference in form between the inquiry as to damages in the case of a patent and of a trade mark is pointed out. Where a patentee has been in the habit of granting licences at a certain royalty, the measure of damages will be the amount of royalty which ought to have been paid. *Penn* v. *Jack*, L. R. 5 Eq. 81; 36 L. J. Ch. 455. See also *Betts* v. *De Vitre*, 34 L. J. Ch. 289.]

tract price and that at which it could have been purchased elsewhere. The mere fact that some ulterior profit might have been made out of it cannot be considered, because such profit formed no part of the contract (*p*). This distinction has been very clearly pointed out in a case in the Supreme Court of New York. The plaintiffs had contracted with the defendants to furnish marble from a specified quarry at a fixed sum for the erection of a City Hall. The plaintiffs entered into a contract with the proprietors of the quarry for the required amount at a smaller sum. After delivering a part of the marble the defendants refused to receive any more. The plaintiffs sued for breach of contract, and claimed as damages the profit they would have made by furnishing the marble at a larger sum than they were to pay for it. Kent, J., ruled accordingly "that the jury should allow the plaintiffs as much as the performance of the contract would have benefited them;" and this ruling was affirmed in the court above. Nelson, C. J., said, "It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business to enter into a safe or reasonable estimate of damage. Thus any supposed successful operation the party might have made, if he had not been prevented from realising the proceeds of the contract, at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation, in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting . . . When the books and cases speak of the profits anticipated from a good bargain, as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the

(*p*) See *ante*, p. 8.

contract itself—entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement." (*q*)

Cases where profits not allowed for.

Numerous instances will occur in the course of this work in which loss of profits has been rejected as an element in damages. A few instances, however, may be mentioned here as illustrating the rule. In detinue for not returning scrip it was ruled by Cresswell, J., that no damages could be given for the loss sustained by the plaintiff, in consequence of the detention of the shares having prevented his paying up deposits, which would have entitled him to an allotment of one thousand other shares, as this damage was too remote (*r*). So where an auctioneer entered into an agreement on behalf of defendant to sell premises to plaintiff, without having communicated the treaty to the former. The defendant had in the meantime sold to a third party. An action was brought for breach of contract, and the same learned judge held that no damages could be given for the loss of the plaintiff's bargain, saying, "his real loss is the loss of the use of the 50*l.* paid as deposit, and the expenses incurred by him to his attorney, and this, I think, is all that he can recover" (*s*). In another case the contract was to demise a ferry and premises, and the plaintiff was promoter of a company provisionally registered for the purpose of working the ferry, and was also its solicitor. No title could be made out, and in an action against the vendor, it was held that the plaintiff could not recover for loss of profits from the granting of the lease and the establishment of the association; nor the profits he would have derived from being employed as solicitor by the association, nor in respect of any advantage he would have derived from his time, labour, &c., employed in the formation of the association (*t*). There is one case in which there seems

(*q*) *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 62.
(*r*) *Archer* v. *Williams*, 2 C. & K. 26.
(*s*) *Tyrer* v. *King*, 2 C. & K. 151. See upon this point, *post*, p. 135, *et seq.*
(*t*) *Hanslip* v. *Padwick*, 5 Exch. 615.

actually taken place at the time, and is communicated to the other party. The reason is, that such a profit is utterly incapable of valuation. It may depend upon a change of weather, a scientific discovery, an outbreak of war, a workmen's strike. It will depend upon the energy and sagacity of the person who purchases the goods, and the solvency of the person to whom he sells them again. In short, if the Scotch rule were to be carried out to its fair extent, no one could contract to sell goods which were not actually in his possession, without charging an additional premium, commensurate to the profits which the vendee might possibly make, and for which he himself would have to pay, if prevented from carrying out his agreement (*a*).

Damage remote from want of connexion with cause of action.

All the previous cases, according to English law, are resolved by answering the question:—Is the particular result such as might have been contemplated by the parties, as naturally flowing from the act done? The same question, upon the same principle, solves a number of other cases, in which profits do not come into consideration. For instance: the defendant libelled a concert singer, who, in consequence, refused to sing at the plaintiff's oratorio, for fear of being badly received. It was held that this damage to the plaintiff was not sufficiently connected with the act of the defendant to entitle the former to an action. It was said that the refusal to sing might have proceeded from groundless apprehension, or caprice, or some completely different cause (*b*). A still stronger case was where the defendant, by beating an actor, prevented his performing, and the injury to the manager of the theatre was also held to be too remote (*c*). The same principle has been applied in cases of slander, where the words used were not in themselves defamatory, though by a strained construction they were so understood. The plaintiff was a shopwoman, and the defendant had said of her, "she secreted one shilling and sixpence under the till; stating these are not

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[(*a*) This reasoning was cited with approbation by Crompton, J. and Blackburn, J., in *Williams* v. *Reynolds*, 6 B. & S. 495; 34 L. J. Q. B. 221.]

(*b*) *Ashley* v. *Harrison*, 1 Esp. 48.

(*c*) *Taylor* v. *Neri*, 1 Esp. 386; but considerable doubts were thrown upon the authority of this decision in the recent case of *Lumley* v. *Gye*, 2 E. & B. 216; 22 L. J. Q. B. 463.

times to be robbed." In consequence of these words S. refused to employ her. It was held that no action lay. "If S. refused to take the plaintiff into his service on this account, he acted without reasonable cause; and in order to make words actionable, they must be such that special damage may be the fair and natural result of them" (*d*). In one case, the Court exercised rather a perverse ingenuity in holding damage to be insufficiently shown. The plaintiff was a dealer in the funds, and the words were "he is a lame duck," which in Stock Exchange parlance mean, a person unable to fulfil his contracts. The Court said that the contracts alluded to might be unlawful, and if so, no special damage could follow from a charge that he had not done what the law prohibits. It seems rather hard on the plaintiff to assume, for the sake of letting him be abused, that he was acting illegally (*e*). On the other hand, where words, which in themselves import an accusation, are uttered in presence of a third person, who acts upon them to the injury of the plaintiff, in such a manner as might naturally have been expected, it is no matter whether the third person believed the accusation or not, if his conduct was in fact caused by the accusation being made. This may be illustrated by a case where the defendant came to his tenant, by whom the plaintiff was employed, and in whose house she lodged, and used language ascribing licentious conduct to her. The tenant disbelieved the charge, but turned the plaintiff away for fear of displeasing the landlord (*f*). In either view the damage was clearly the immediate and probable result of the words used.

[In a case where commissioners of an inland navigation executed a lease of a canal for a term of years pursuant to a statute which enacted that in case the lessee should permit the works to be out of repair the commissioners should give him notice to repair, and on his neglecting to do so might do the repairs and pay the expenses out of the tolls, a lock forming part of the navigation fell in, and the plaintiff's barge was delayed. The lock had been out of repair to the knowledge of

(*d*) *Per* Taunton J., *Kelly* v. *Partington*, 5 B. & Ad. 645, 650.
(*e*) *Morris* v. *Langdale*, 2 B. & P. 284.
(*f*) *Knight* v. *Gibbs*, 1 A. & E. 43.

the commissioners, but they had given no notice to the lessee. The plaintiff claimed from the commissioners damages for the delay, but it was held that, assuming an action to lie against the commissioners for not having given notice to the lessee to repair, the damage to the plaintiff was not the proximate natural result of that breach. It did not follow that if they had given the notice the repairs would have been done (*g*). And in another case a declaration, stating that the defendant conspired and combined with a confederate to take the plaintiff's premises and set up illicit stills there, and by falsely pretending that the premises were wanted for a lawful and innocent trade, induced the plaintiff to let the premises to the confederate and permit him and the defendant to take possession, whereupon they set up the still and represented the plaintiff to be the proprietor, by reason of which he was convicted of aiding and abetting in the illicit distillation, was held bad on demurrer, the damage not being the legitimate consequence of the defendant's acts (*h*).]

Damage arising from non-repair of fences.

There are two old cases in which the defendant was sued for consequential damage, arising from non-repair of his fences. In one case the plaintiff's cattle strayed into defendant's close, and thence upon the land of W., who sued the plaintiff, which was the damage complained of (*i*). In another, the plaintiff's mare went through a gap, and falling into a ditch was drowned (*k*). In neither of these cases was any objection taken on account of the remoteness. They were affirmed and relied upon in a more modern case, where the damage resulting from a similar non-repair of fences was, that the plaintiff's horse escaped into the defendant's close, and was there killed by the falling of a haystack (*l*). Here the objection that the damage was too remote was expressly taken and over-ruled. [And more recently where the defendant's horse escaped into an occupation road and thence into the plaintiff's

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[(*g*) *Walker* v. *Goe*, 3 H. & N. 395; 27 L. J. Ex. 427; affirmed, 4 H. & N. 350, 28 L. J. Ex. 184.]

[(*h*) *Barber* v. *Lesiter*, 7 C. B. N. S. 175; 29 L. J. C. P. 161. See for an example of damage too remote in an action of false representation, *Collins* v. *Cave*, 4 H. & N. 225; 30 L. J. Ex. 55.]

(*i*) *Holbach* v. *Warner*, Cro. Jac. 665.

(*k*) Anon., 1 Ventr. 264.

(*l*) *Powell* v. *Salisbury*, 2 Y. & J. 391.

close and kicked the plaintiff's horse, the damage was held to be not too remote (*m*).]

It is said in one old case, that where a master sends his servant to pay money for him upon the penalty of a bond, and in his way a smith in shoeing doth prick his horse, and so by reason of this the money is not paid; this being the servant's horse, he shall have an action upon the case for pricking of his horse; and the master also shall have his action upon the case for the specific wrong which he has sustained by non-payment of his money, occasioned by this (*n*). This case is cited by Parke, B. (*o*), with the remark that, "that cause of action is certainly rather remote." I conceive that such damage could not be allowed for in the present day, even though the master were owner of the horse as well as the money.

Damage remote when caused by plaintiff's own act.

Damage will obviously be too remote when it is caused, wholly or principally, by the act of the plaintiff himself; it cannot then be regarded as the necessary result of the defendant's misconduct. Hence, where the captain of a ship had wrongfully imprisoned the plaintiff, and some time after his release, on touching land, the plaintiff changed into another ship, it was decided that he could not recover as damages the costs so incurred. Lord Ellenborough said, the special damage should be closely connected with the trespass which was the foundation of the action. Here the imprisonment was not the *causa proxima* of the transhipment. The latter was remote in point of time, and the plaintiff was not driven to it to redeem himself from any great peril or grievance (*p*). A more recent case stands on the same principle. The plaintiff had taken a passage to Australia in the defendant's vessel, but was not allowed to sail on account of a mistaken belief that he had not paid his entire fare. The error was found out immediately, and he was offered a passage

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[(*m*) *Lee* v. *Riley*, 18 C. B. N. S. 722; 34 L. J. C. P. 212. This action was for a trespass, and was distinguished from *Cox* v. *Burbidge*, 13 C. B. N. S. 430; 32 L. J. C. P. 89, where the defendant's horse having strayed on to a highway, and there kicked a child, the defendant was held not to be liable unless shown to have known the horse's vicious disposition.]

(*n*) *Everard* v. *Hopkins*, 2 Bulst. 332.

(*o*) 6 Rxch. 764.

(*p*) *Boyce* v. *Bayliffe*, 1 Camp. 58.

in another vessel which sailed a week after the first. Instead of going by it, he remained in England till December to sue the defendant. It was held that the expenses of his keep till trial could not be allowed as damages, since he might have gone long ago if he had wished; they might however be allowed as costs, if his evidence was necessary, and it was fit that he should have been kept as a witness (*q*).

[And upon the same principle a passenger who was removed from a railway carriage by the servants of the railway company under circumstances which did not justify the removal, was held not entitled to recover the value of a pair of race-glasses which he negligently left in the carriage and which were lost (*r*). And the owners of a ship which had been run into by another ship, though entitled to recover for damage which was the immediate consequence of the collision, were held not entitled to recover for damage which resulted from the master's refusing assistance offered to him, and failing to use ordinary skill in attempting to save his ship after the collision (*s*).]

Cases of contributory negligence.

This rule is frequently brought to bear in actions on the case for negligence, where the question is, whether the injury was so completely the result of the defendant's act as to support the declaration (*t*). Where A. placed lime rubbish in the highway, which blowing into the face of B.'s horse frightened it, so that it nearly dashed against a passing waggon, and in his efforts to avoid it B. unskilfully drove against another heap of rubbish, and was overset and hurt, it was held that he could not recover against A. (*u*). But the rule has been laid down and repeatedly recognised, that although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequence of the defendant's negligence, he is entitled to recover; if by ordinary care he might have

Where plaintiff may recover though himself in fault.

(*q*) *Ansett* v. *Marshall*, 22 L. J. Q. B. 118; 1 B. C. C. 147, S. C.

[(*r*) *Glover* v. *London and S. W. Ry. Co.*, L. R. 3 Q. B. 25; 37 L. J. Q. B. 57. See also *Hill* v. *Balls*, *post*, p. 135.]

[(*s*) *The Flying Fish*, 34 L. J. Adm. 113, in the Privy Council.]

(*t*) *Butterfield* v. *Forrester*, 11 East, 60; *Holden* v. *Liverpool Gas Co.*, 3 C. B. 1; *Gen. Steam Nav. Co.* v. *Mann*, 14 C. B. 127; [*Cotton* v. *Wood*, 8 C. B. N. S. 568; 29 L. J. C. P. 333]; *Martin* v. *G. N. Ry.*, 16 C. B. 179.

(*u*) *Flower* v. *Adam*, 2 Taunt. 314.

avoided them, he is the author of his own wrong (*x*). And where the immediate cause of the accident is the defendant's fault, so that without it the accident could not have happened at all, it is no answer that only for the plaintiff's negligence in something collateral to the immediate cause of the injury, it or part of it might have been avoided. For instance, where two omnibuses were racing, and one struck against the other, it appeared that if the omnibus in which plaintiff was riding had been driving slower, it might have been pulled up after a collision, and the accident prevented (*y*). And so where the injury to plaintiff was caused by a steamboat collision, in which the plaintiff was hurt by the falling of an anchor in his own vessel: held, that even if it had been shown that the anchor had been negligently stowed, and that the plaintiff ought not to have been in that part of the vessel, (which, however, the jury negatived), this would have been no answer: that a man who is guilty of a wrong, and thereby produces injury to another, has no right to say "part of that mischief would not have arisen if you yourself had not been guilty of some negligence," and that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer (*z*). In both the last-named cases, Pollock, C. B., expressed a strong doubt whether a man is responsible for all the consequences that may under any circumstances arise in respect of mischief, which by no possibility could he have foreseen, and which no reasonable person could be called on to have anticipated. He intimated that the rule was that a man is expected to guard against all reasonable consequences. As an illustration both of the principle of these cases, and of the limitation suggested by the Lord Chief Baron, may be mentioned a case in which it was held that a person making

Cases in which plaintiff is a trespasser.

(*x*) *Bridges* v. *G. Junc. Ry.*, 3 M. & W. 244, 248; [*Ellis* v. *London and S. W. Ry. Co.*, 2 H. & N. 424; 26 L. J. Ex. 349; *Singleton* v. *Williamson*, 7 H. & N. 410; 31 L. J. Ex. 17; *Thompson* v. *N. E. Ry. Co.*, 2 B. & S. 106; 30 L. J. Q. B. 67; affirmed, 2 B. & S. 119; 31 L. J. Q. B. 194; *Skelton* v. *London and N. W. Ry. Co.*, L. R. 2 C. P. 631; 36 L. J. C. P. 249].

(*y*) *Rigby* v. *Hewitt*, 5 Exch. 240.

(*z*) *Greenland* v. *Chaplin*, 5 Exch. 243. [See also *Tuff* v. *Warman*, 2 C. B. N. S. 740; 26 L. J. C. P. 263; affirmed in Ex. Ch. 5 C. B. N. S. 573; 27 L. J. C. P. 322; *Dowell* v. *Steam Navigation Co.*, 5 E. & B. 195; 26 L. J. Q. B. 59.]

an unfenced excavation on his own land, near a public highway, was responsible for an injury caused by falling into it, though the person injured was in fact a trespasser (*a*). But there the excavation was so near the road as to be dangerous to persons walking along it, who might stray from the path even while exercising ordinary caution. The injury was one which might have been anticipated. But it could hardly be contended that a man would be answerable for the result of digging a hole in a field far removed from any path, and where he could not have contemplated that any one would come (*b*).

There would be a strong analogy between such a case and one very recently decided under different circumstances. The defendant had contracted to carry plaintiff's goods, and the plaintiff, by consent of the defendant's carman, got into the cart, which broke down. The plaintiff was held not to be entitled to recover for the personal damage. The carman had no authority to allow her into the cart, where she was a mere trespasser (*c*). There is a somewhat similar case in which a contrary decision was arrived at. A little child clambered into the defendant's cart, while left unattended, and fell out and was hurt, the horse being moved on. The action was held to be maintainable (*d*). The Court of Exchequer in the case cited above attempted to distinguish *Lynch* v. *Nurdin* on the ground of the tender years of the child, which made her not the sole defaulter. Considerable discredit, however, was thrown upon the decision, especially by Alderson, B. (*e*). [And it is now settled that the doctrine of contributory negligence applies to infant plaintiffs (*f*).]

There is one case which seems contrary to the doctrine laid

(*a*) *Barnes* v. *Ward*, 9 C. B. 392.

(*b*) *Blyth* v. *Topham*, Cro. Jac. 158. *Per* Alderson, B., *Jordin* v. *Crump*, 8 M. & W. 782. [And accordingly *Hardcastle* v. *S. Yorkshire Ry. Co.*, 4 H. & N. 67; 28 L. J. Ex. 139; *Hounsell* v. *Smyth*, 7 C. B. N. S. 731; 29 L. J. C. P. 203; *Binks* v. *S. Yorkshire Ry. Co.*, 3 B. & S. 244; 32 L. J. Q. B. 26.]

(*c*) *Lygo* v. *Newbold*, 9 Exch. 302; 23 L. J. Ex. 108.

(*d*) *Lynch* v. *Nurdin*, 1 Q. B. 29.

(*e*) See his remarks, 23 L. J. Ex. 110.

[(*f*) *Singleton* v. *Eastern Counties Ry. Co.*, 7 C. B. N. S. 287; *Abbott* v. *MacFie*, and *Hughes* v. *MacFie*, 2 H. & C. 744; 33 L. J. Ex. 177; *Mangan* v. *Atherton*, L. R. 1 Ex. 239; 35 L. J. Ex. 161.]

down in *Rigby* v. *Hewitt* and *Greenland* v. *Chaplin*, viz.: that a party is entitled to recover for the whole result of defendant's negligence, though in part attributable to himself. Where a barge was sunk by the swell of a steamer, and the jury gave only a fourth part of the damage actually sustained, alleging as their reason that the blame was not attributable to the defendant alone, and that the barge was not properly trimmed; the verdict was upheld by the Court (*g*). But it will be observed that in that case the motion was not by the plaintiff for a new trial on account of the smallness of the damages, but by the defendant on the ground that their finding amounted to a verdict in his favour, which on the authority of the preceding cases it clearly did not. It appears, too, in the judgments in that case, to have been assumed by the Court that the jury were not strictly justified in reducing the damages on the ground alleged by them (*h*).

[Where, through the breaking of a defective rein, the horses of defendant's stage-coach, in which the plaintiff was a passenger, ran away, and the plaintiff jumped off and was injured, it was held that he could recover damages, though the coach was not overturned and he would not have been injured if he had sat still. Lord Ellenborough said that it was sufficient that he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril (*i*). In a recent case a plaintiff, who had fallen out of a railway carriage while trying to shut the door which the defendants' servants had left open, was nonsuited on the ground that the inconvenience which he would have sustained by travelling with the door open was not comparable with the danger to which he exposed himself (*j*).]

It may be observed, that in considering the question of negligence as affecting damages, the plaintiff [has been held to be] identified with the owner of the vehicle, &c., in which he

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(*g*) *Smith* v. *Dobson*, 3 M. & G. 59.

(*h*) See *Raisin* v. *Mitchell*, 9 C. & P. 613, to which the same remarks will apply.

[(*i*) *Jones* v. *Boyce*, 1 Stark. 493. And see *The Industrie*, L. R. 3 A. & E. 303; 40 L. J. A. 26.]

[(*j*) *Adams* v. *Lancashire and Yorkshire Ry. Co.*, L. R. 4 C. P. 739; 38 L. J. C. P. 277.]

is at the time, so that if the owner could not recover, neither can the plaintiff (*k*); [but great doubts have been thrown upon the correctness of the decision (*l*).]

Damage resulting from plaintiff's premature act.

The last instance that I shall give of damage caused by the plaintiff's own act is to be found in cases where he has incurred premature expense, in reliance upon the defendant's performing his contract. This subject will be noticed again in treating of sales of land. One illustration will be sufficient at present. It was an action on a covenant of the 17th Sept. to demise a ferry, and to make a good title within fourteen days from the date of the agreement. The plaintiff was to pay 3150*l.* on the 29th Nov. if title could be made out. No title could be established. The plaintiff was promoter of a company provisionally registered for the purpose of working the ferry. It was held that no damages could be given for the expense of raising the 3150*l.*, nor the loss of interest upon it, nor for the costs of preparing the company's deed of settlement, and procuring provisional registration, because these were damages incurred by the plaintiff's own imprudence in beginning to act before he had ascertained whether the plaintiff could or could not complete his contract (*m*).

Damage too remote when the wrongful act of a third party.

Another case in which damage will be too remote arises where it is the wrongful act of a third party, such as could not naturally be contemplated as likely to spring from the defendant's conduct (*n*). A wider doctrine than this was formerly

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(*k*) *Thorogood* v. *Bryan*, 8 C. B. 115.

[(*l*) See 1 Smith's Leading Cases, 266, 6th ed.; *Tuff* v. *Warman*, 2 C. B. N. S. 750; 26 L. J. C. P. 265; *per* Williams, J., and *The Milan*, 31 L. J. Prob. Mat. & Adm. 105, in which last case Dr. Lushington refused to be bound by the decision in *Thorogood* v. *Bryan*. In a recent case an infant of tender years, who was injured upon a railway, was held to be identified for the purposes of contributory negligence, with her grandmother, under whose care she was, but there it was considered to be a term of the contract between the railway company and the grandmother, that the latter should take proper care of the child, and the Court of Queen's Bench expressly refrained from giving an opinion upon the right of passengers by coaches and ships, to recover for damages suffered from the negligent management of other coaches and ships, where there had been negligence in the management of those by which they were travelling. *Waite* v. *N. E. Ry. Co.*, E. B. & E. 719; 27 L. J. Q. B. 417; affirmed in Ex. Ch., E. B. & E. 728; 28 L. J. Q. B. 258.]

(*m*) *Hanslip* v. *Padwick*, 5 Exch. 615.

[(*n*) A simple illustration of this rule will be found in the case put by James, L. J., of the bailee of a key carelessly allowing it to fall into the possession of a man who commits a burglary, and by means of the key opens a box containing valuable property. *Re United Service Co., Johnston's Claim*,

maintained, viz., that where the act of the defendant caused a wrongful act of another, for which the plaintiff would have a right to sue such last-named party, he could not have a right of action against the original wrong-doer also. This doctrine rested upon the case of *Vicars* v. *Wilcocks* (*o*), and a *dictum* of Lord Eldon's in *Morris* v. *Langdale* (*p*). Carried to this extent, however, it was much shaken by Mr. Starkie in his work on Libel and Slander (*q*), and by the Court of Exchequer in *Green* v. *Button* (*r*), and is now finally overruled by the case of *Lumley* v. *Gye* (*s*). That was an action by the manager of a theatre against the manager of a rival house for inducing a singer to break her engagement with him. Of course he had a remedy against the singer herself upon her agreement, and an attempt was made to frustrate the action by means of the doctrine above alluded to. The Court of Queen's Bench, however, decided against it, and stated the true import of the case of *Vicars* v. *Wilcocks*, in accordance with the explanation previously given by Mr. Smith (*t*). The facts of that much-discussed case were as follows. The defendant, in conversation with various persons, *but not* with either A. or B., accused the plaintiff of maliciously cutting his cord. This charge was repeated both to A. and B. The plaintiff was at the time in the service of A., who in consequence of what he heard, wrongfully dismissed the plaintiff before his time was out. He then applied to B. for employment, who refused, both on account of what he had heard, and because his former master had discharged him for the offence imputed to him. Upon this evidence the plaintiff was nonsuited. A rule to set aside the nonsuit was refused. Lord Ellenborough said that the special damage must be the legal and natural consequence

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L. R. 6 Ch. at p. 218; 40 L. J. Ch. at p. 288. Other recent illustrations will be found in *Blagrave* v. *Bristol Water Works Co.*, 1 H. & N. 369; 26 L. J. Ex. 57; *Cahill* v. *Dawson*, 3 C. B. N. S. 106; 26 L. J. C. P. 253; *Collins* v. *Cave*, 4 H. & N. 225; 28 L. J. Ex. 204; affirmed in Ex. Ch. 6 H. & N. 131; 30 L. J. Ex. 55; *Sully* v. *Duranty*, 3 H. & C. 270; 33 L. J. Ex. 319.]

(*o*) 8 East, 1 [2 Sm. L. C. 487, 6th ed.]

(*p*) 2 B. & P. 284.

(*q*) 2nd ed. 205. [3rd ed. 326.]

(*r*) 2 C. M. & R. 707.

(*s*) 2 E. & B. 216; 22 L. J. Q. B. 463.

(*t*) 2 Sm. L. C. 305. [6th ed. 487.]

of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence; a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond, by way of punishment for his supposed transgression. As to the second point, it was plain that B.'s refusal to employ the plaintiff proceeded rather from his dismissal by A. than from the defendant's words. It is evident that this case may well stand upon two grounds:—1stly. That the dismissal of the plaintiff by A. was not the natural or necessary consequence of the defendant's language, but a mere act of spontaneous caprice; 2ndly. That the result did not, in fact, spring from the defendant's having used the words, but from their repetition by those who heard them (*u*). On this ground alone it has been held that damage is too remote when it arose, not from the defendant's uttering the expressions, but from the person to whom he spoke repeating them (*x*). Such a spontaneous and unauthorised communication cannot be considered the necessary consequence of the original uttering of the words. It is the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he was not answerable, that was the immediate cause of the plaintiff's damage (*y*). But where the words were spoken to a person whose duty it was to repeat them, it would be different; for there their repetition is the natural result of their being uttered (*z*). [It would be different also if the defendant himself suggested the repetition (*a*).

[(*u*) See further the criticisms upon this case in *Lynch* v. *Knight*, 9 H. of L. Ca. 577; 2 Smith's L. C., 6th ed., at p. 492. Lord Wensleydale, alluding to the absurd case put by Lord Ellenborough of the plaintiff being thrown into a horse-pond, said that he could conceive circumstances under which that might be the natural result of an accusation of the plaintiff made to an excited mob.]

(*x*) *Holwood* v. *Hopkins*, Cro. Eliz. 787; *Ward* v. *Weeks*, 7 Bingh. 211.

(*y*) *Per* Tindal, C. J., *ubi sup.*

(*z*) *Kendillon* v. *Maltby*, 1 C. & Mar. 403; [*Derry* v. *Handley*, 16 L. T. N. S. 263. But see *Parkins* v. *Scott*, 1 H. & C. 153; 31 L. J. Ex. 331, where Wilde, B., said that if moral obligations or considerations of duty to repeat slanders are to be substituted for the authority by the utterer to repeat his words necessary to render him liable, the question of liability will be involved in inextricable confusion.]

[(*a*) *Adams* v. *Kelly*, Ry. & Mood. 157; *Parkes* v. *Prescott*, L. R. 4 Ex. 169; 38 L. J. Ex. 105].

Where, however, the defendant's negligence is the primary and substantial cause of the damage sustained by the plaintiff, he will be responsible for the whole damage, though it may have been increased by the injurious conduct of a third person, or though there may have been negligence on the part of such person, which, jointly with the defendant's negligence, has caused the damage (*b*).]

Contributory wrongful act of third party.

It frequently happens that one person is forced to incur expense in legal proceedings in consequence of a breach of contract, or tortious act of another. It is often a matter of considerable nicety to know whether costs so incurred can be recovered as damages against the offending party. The solution of the question depends upon the rules laid down above as to remoteness of the damage; but I have preferred for greater clearness to discuss the subject separately.

When costs of former actions are recoverable.

In the first place, it is a general principle that the right to costs must always be considered as finally settled in the court where the question is adjudicated on, to which that right is accessory; so that, if any costs are awarded, nothing beyond the sum taxed, according to the rules of the court, can be recovered as damages; or if costs were expressly withheld by an adjudication in the particular case, none would be recoverable by suit in any other court (*c*). Accordingly, where A. filed a bill for specific performance, to compel B. to carry out a contract for the sale of land to him, and the bill was dismissed without costs according to the practice in Chancery, because B. could not make out a good title, it was ruled that these costs could not be recovered as damages for breach of contract in an action by A. against B. (*d*). And similarly,

Decision of the original Court final.

[(*b*) *Collins* v. *Middle Level Commissioners*, L. R. 4 C. P. 279; 38 L. J. C. P. 236; *Burrows v. March Gas Co.*, L. R. 5 Ex. 67; 39 L. J. Ex. 33; affirmed L. R. 7 Ex. 96; 41 L. J. Ex. 46; *Harrison* v. *G. N. Ry. Co.*, 3 H. & C. 231; 33 L. J. Ex. 266; and see *Smith* v. *Dobson*, 3 M. & G. 59.]

(*c*) *Hathaway* v. *Barrow*, 1 Campb. 151; *Sinclair* v. *Eldred*, 4 Taunt. 7; *Jenkins* v. *Biddulph*, 4 Bingh. 160; *Grace* v. *Morgan*, 2 Bing. N. C. 534; overruling *Sandback* v. *Thomas*, 1 Stark. 306; *Doe* v. *Hare*, 2 Dowl. 245; *Symonds* v. *Page*, 1 C. & J. 29; *Doe* v. *Filliter*, 13 M. & W. 47, 49; overruling *Gould* v. *Barratt*, 2 M. & Rob. 171.

(*d*) *Malden* v. *Fyson*, 11 Q. B. 292. [See a very recent case, in which the plaintiff had deposited share certificates with his bankers, and through their negligence their manager had been enabled fraudulently to sell the shares and forge a transfer, and the plaintiff instituted suits against the innocent transferees, in which he succeeded, but was refused his costs. It was held that he

where a judgment was set aside for irregularity, but without costs, and the plaintiff afterwards brought an action for seizing his goods under the judgment, he was not allowed to recover as special damages the costs of setting it aside (*e*). But for this purpose, it is necessary that there should be an actual adjudication against the plaintiff's right to costs. A. having been illegally arrested on mesne process, applied to the court for his discharge. The rule was referred to a judge at chambers, who ordered him to be released, and would have given him the costs of the rule, if he had undertaken not to bring an action. On his refusal, no order was made as to costs. He then brought an action of false imprisonment, and it was held that he was entitled to recover those costs as special damage. The case was distinguished from that last cited; for there the order had been made absolute without costs: here, the judge had made no adjudication upon the point (*f*).

An actual decision is necessary.

The reason of this rule may be that costs are, in theory, supposed to be a compensation for the expenses justly and necessarily incurred in the action, and that any costs beyond these must be assumed to have been unnecessary; and, therefore, too remote for a ground of damage. Probably, however, its principal basis is the respect paid by one court to the decisions of another, which prevents any inquiry into them with the view of altering their effect.

When costs as between attorney and client may be allowed.

There seem to be two exceptions to the rule that full costs, as between attorney and client, cannot be allowed as damages. The first is rather an apparent than a real exception. It relates to cases where costs could not be taxed; for instance, where judgment obtained by the defendant had been reversed in error, in which case a Court of Error cannot award costs (*g*). And so where judgment had gone by default in the old action of ejectment, when it was not the practice for the officers to

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could not recover them from the bankers. *Re United Service Co., Johnston's Claim*, L. R. 6 Ch. 212; 40 L. J. Ch. 286.]

(*e*) *Loton* v. *Devereux*, 3 B. & Ad. 343.

(*f*) *Pritchet* v. *Boevey*, 1 C. & M. 775. [A plaintiff obtaining a verdict in prohibition, cannot recover the costs of the proceedings in the court below as damages under 1 Will. 4, c. 21, s. 1. *White* v. *Steele*, 12 C. B. N. S. 413 note; 32 L. J. C. P. 1.]

(*g*) *Nowell* v. *Roake*, 7 B. & C. 404.

tax against the casual ejector (*h*). The other exception is where the plaintiff has a right to an indemnity; there it has been laid down by Lord Tenterden, "that he is not indemnified unless he receives the amount of the costs paid by him to his own attorney" (*i*). This distinction seems to be a just one: where the obligation to repay costs is thrown by the law upon a party against his will, it is fair that he should only repay those costs which the law has itself allowed; but where he has expressly undertaken to save harmless, every expense, whether taxed or not, may be justly recoverable (*k*). It must be stated, however, that *Smith* v. *Compton* was not a case of express, but of implied indemnity, arising out of a covenant for good title to convey: the plaintiff had defended an action brought against him by a party with superior title. It may be a question whether, upon the facts of the particular case, the same decision would be arrived at again.

Costs not allowed when action for collateral purpose.

Costs of maintaining a former action will, of course, never be recoverable, where the plaintiff might have obtained full satisfaction for the wrong done him without entering upon the suit, and where the costs were incurred for some merely collateral purpose. Hence where the plaintiff, in an action against the vendor of land, for not carrying out his contract, claimed as damages the extra costs of a bill for specific performance, Tindal, C. J., said, "the extra costs in Chancery are not a damage which is a necessary consequence of the breach of this contract. The filing a bill for a specific performance, is one degree removed from a consequence of the contract, and the plaintiff must take the consequence of the suit as in other cases" (*l*). So in an action of trespass for taking goods under a warrant of attorney and judgment, which were afterwards set aside as illegal, the costs of setting aside the judgment were not allowed (*m*). This rule, and its limitation, were well explained in a very recent case. The plaintiff had been committed to prison for manslaughter, by

(*h*) *Doe* v. *Huddart*, 2 C. M. & R. 316.
(*i*) *Smith* v. *Compton*, 3 B. & Ad. 407.
(*k*) *Sparkes* v. *Martindale*, 8 East, 593, 596; *Lloyd* v. *Mostyn*, 2 Dowl. N. S. 476.
(*l*) *Hodges* v. *Litchfield*, 1 Bingh. N. C. 492.
(*m*) *Holloway* v. *Turner*, 6 Q. B. 928.

a coroner's warrant. He was admitted to bail, and subsequently got the inquisition, under which he had been committed, quashed. It was held that in an action against the coroner, he might recover as special damage the costs of quashing the inquisition. Lord Campbell, C. J., said, "if the plaintiff had been discharged on a habeas corpus instead of being admitted to bail, and had afterwards got the inquisition quashed, I should have thought that he could not have included the costs of quashing in his damages, according to *Holloway* v. *Turner*. There the object was to recover damages for seizing and selling the goods, which he might have done without setting aside the judgment. But here, he was only released from prison upon giving bail to appear and take his trial. He was still liable to surrender on his own recognizances, and was not a perfectly free man till he had got rid of the inquisition. By doing that he was restored to his original state, but until then, the effects of the wrongful imprisonment were not done away with. Therefore this is damage which flowed from the wrongful act of the defendant" (*n*).

Nor when he had no real defence.

As a further consequence of the principle, that costs of suit must be the necessary result of the defendant's misconduct, it follows that they can never be allowed for where the plaintiff had no *locus standi* in law in the former action. Where this is the case, all costs were clearly incurred in consequence of his own obstinacy or ignorance. "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action which he cannot defend" (*o*). The question in these cases is, whether the plaintiff, in defending the action, did what a reasonable man would do under similar circumstances, where he had no other judgment but his own to resort to. And accordingly where the plaintiff's ship had been run down by the defendant, and the plaintiff had been forced to employ a steam-tug, the owners of which claimed salvage 150*l.* and commenced a suit in the Admiralty Court; the plaintiff paid in 20*l.* and was adjudged to pay 45*l.* more; held that he could not recover

(*n*) *Foxall* v. *Barnett*, 23 L. J. Q. B. 8; 2 E. & B. 928.

(*o*) *Short* v. *Kalloway*, 11 A. & E. 29; [*Ronneberg* v. *Falkland Islands Co.*, 17 C. B. N. S. 1; 34 L. J. C. P. 34; *Godwin* v. *Francis*, *post*, p. 52; *Pow* v. *Davis*, *post*, p. 52.]

the costs of this suit against the defendants; and Parke, B., said it was like the case of repairs, in which it has been held that if the party chooses to stand the consequence of an action by the tradesman for the value of the repairs, he cannot charge the expense of that upon the party who did the original wrong, which made the repairs necessary (*p*). Accordingly where a bill, accepted by the plaintiff, was deposited with the defendant, as security for a loan, and he after the loan was repaid indorsed the bill to a third party, who on its dishonour arrested the plaintiff, only the value of the bill was allowed in an action against the defendant, and not the cost of the arrest, as he ought to have paid it when due (*q*). And so in a similar case, where the plaintiff had defended the action (*r*). And the rule is the same, though the plaintiff is accommodation acceptor, who has been sued on his acceptance, and is now suing the accommodation drawer (*s*). So in a case in which the plaintiff guaranteed A. that defendant would upon demand pay A. whatever should from time to time be due. A demand was made upon defendant, and upon non-payment, a writ issued against plaintiff for the amount, this being the first notification he received. He allowed judgment to go by default, and execution was levied upon his goods. It was decided, that he might recover against the defendant the costs of the writ, but not of any other proceeding. That was the only expense to which he was necessarily put, as he was supposed by law to have the money ready, without the process of execution (*t*).

This case seems to overrule a decision of Lord Hardwicke's, who allowed in such an action the costs of an extent issued by the crown against a surety, which he had contested some time. In answer to the objection that the debt was improperly disputed, he said, "I know of no such distinction." He also relied upon the fact that an extent is both an action and execution, and said that the surety could not be supposed prepared

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(*p*) *Tindall* v. *Bell*, 11 M. & W. 228, 232.
(*q*) *Roach* v. *Thompson*, 4 C. & P. 194.
(*r*) *Bleaden* v. *Charles*, 7 Bingh. 246.
(*s*) *Beech* v. *Jones*, 5 C. B. 696. The contrary doctrine was assumed in *Jones* v. *Brooke*, 4 Taunt. 464; *Stratton* v. *Mathews*, 3 Exch. 48; but the rule laid down in the text seems clearly to be correct.
(*t*) *Pierce* v. *Williams*, 23 L. J. Ex. 322.

to pay the claim immediately (*u*). Where, however, two sureties had entered into a warrant of attorney, to secure the debt of their principal, and upon his default, judgment was entered upon the warrant, and execution issued against one surety, who had to pay the debt and costs of the execution, it was decided that he might recover half of the costs against his co-surety (*x*). This is quite consistent with the previous cases, because very possibly the execution was the first notice he received that his liability was about to be enforced.

False assertion of authority by agent.

[One who professes to contract as agent for another must, unless there be something in the transaction to rebut the implication, be taken to warrant that the authority which he professes to have does in fact exist; and if he has no such authority, he is liable to make good to the person who enters into the contract upon the faith of his being duly authorised, all the damage which is the natural and proximate consequence of the false assertion of authority (*y*). This will include the costs of unsuccessful legal proceedings taken by such person against the supposed principal for the purpose of enforcing performance of the contract or recovering damages for its breach, if at least it was reasonable under the circumstances of the case that such proceedings should be taken, or if the professed agent was made aware of the litigation and sanctioned it either expressly or by allowing it to be continued without avowing his want of authority (*z*). And though it may be imprudent in some cases to commence proceedings without warning him of the course which it is intended to pursue, it is not essential that he should be consulted, it being a question for the jury in each case whether the complaining party exercised due caution under all the circumstances of the case and whether the legal proceedings were reasonably adopted (*a*).

(*u*) *Ex parte Marshall*, 1 Atk. 262.

(*x*) *Kemp* v. *Finden*, 12 M. & W. 421.

[(*y*) *Collen* v. *Wright*, 7 E. & B. 301; 26 L. J. Q. B. 147; affirmed in Ex. Ch. 8 E. & B. 647; 27 L. J. Q. B. 215. Where the principal for whom the defendant professed to be authorised to contract is insolvent, the damages will possibly be nil. *Per* Blackburn, J., *Richardson* v. *Williamson*, L. R. 6 Q. B. at p. 279.]

[(*z*) *Collen* v. *Wright*, *ubi supra*; *Randell* v. *Trimen*, 18 C. B. 786; 25 L. J. C. P. 307. And see the cases cited *infra*.]

[(*a*) *Hughes* v. *Graeme*, 33 L. J. Q. B. 335; *Collen* v. *Wright*, 7 E. & B.

Thus in *Randell* v. *Trimen* (*b*), a stone merchant who had supplied stone for the building of a church by direction of the architect, who professed to act on behalf of the church building committee, but had in fact no authority to do so, recovered from the architect not only the price of the stone, but also the costs of an unsuccessful action for the price which he had brought against a member of the committee. In this case the architect persisted to the end in his assertion of authority.

Collen v. *Wright.*

In *Collen* v. *Wright* (*c*) which is the leading case upon the subject, a land agent believing that he had proper authority, assumed to let a farm to the plaintiff, upon terms which the owner of the farm had not in fact authorised. The owner refused to grant the lease. The plaintiff filed a bill for specific performance, and finding from the answer that the agent's authority was denied, gave him notice of the suit and ground of defence, and that the suit would be proceeded with at his expense, unless he gave notice not to proceed, in which case as in the event of the dismissal of the bill he would be held responsible for the costs. The agent replied simply that the suit had been commenced without his privity or sanction and that he should resist any attempt to saddle him with costs. The bill was dismissed. It was held that the plaintiff was entitled to recover from the agent's executors, besides money which he had laid out on the farm, the expenses of the Chancery suit. The defendant was considered to have persisted in his assertion of authority so that it became unnecessary to consider whether he ought to have had notice before the commencement of the suit. However this might be, the plaintiff was considered to have acted reasonably in the matter.

In a subsequent case the defendant, acting as broker for both buyer and sellers, made a contract for the sale of wool to the plaintiff on terms which the sellers afterwards repudiated alleging, as was the fact, that they had not authorised them. The defendant persisted in his assertion of authority. There was no wool of a similar character to be obtained in the

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at p. 314; 26 L. J. Q. B. at p. 151, *per* Crompton, J.; *Godwin* v. *Francis*, L. R. 5 C. P., at p. 306; 39 L. J. C. P. at p. 125, *per* Bovill, C. J.]

[(*b*) 18 C. B. 786; 25 L. J. C. P. 307. In this case the declaration charged fraud, but the defendant was considered liable for the misrepresentation, independently of fraud.]

[(*c*) *Ubi supra.*]

market, and the plaintiff filed a bill against the sellers to enforce specific performance of the contract, and obtained an interim injunction to restrain the sale of the wool. The bill was dismissed, and the injunction dissolved with costs on the ground of the defendant's want of authority. The plaintiff was held to be entitled to recover from the defendant, although he was his own agent as well as agent for the sellers, damages for the loss of the bargain and the expenses of the suit, that is to say, the taxed costs paid to the defendants in the suit and the plaintiff's own costs as taxed between solicitor and client. It was objected that the plaintiff should have proceeded by action at law instead of by proceedings in Chancery, but having regard to the peculiar character of the wool, the Court putting themselves in the position of jurymen, pronounced the plaintiff to have acted reasonably (*d*).

In a very recent case, the plaintiff being in the occupation of a house and shop under a lease which would expire in 1867, the defendant, on behalf of his brother, the freeholder, whose rents he had for some time received, agreed to grant the plaintiff, at the expiration of the term, a renewed lease, the plaintiff undertaking in the mean time to put in a new shop front. This the plaintiff did, and in 1865, without communication with the defendant or his brother, sold all her interest in the premises to one B. for 150*l*. The freeholder refused to grant the lease, and the plaintiff in conjunction with B. filed a bill for specific performance against him, which was dismissed, the defendant being examined on behalf of his brother, and admitting that he had entered into the agreement without consulting him and without authority. B. was turned out of possession and brought an action against the plaintiff, and recovered damages for the loss of the lease, loss on re-sale of fixtures, loss of business, and other matters. The plaintiff then sued the defendant, and claimed from him damages for the loss of the lease, the expenses of the Chancery suit, the damages which she had been compelled to pay B. and the costs of B.'s action. She was held to be entitled to the value of the term as enhanced by the expenditure contemplated by the

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[(*d*) *Hughes* v. *Graeme*, 33 L. J. Q. B. 335].

agreement itself and to the cost of the Chancery suit, but not to the damages or costs which she had sustained in consequence of her re-sale to B. These last were clearly too remote. They were not the natural consequences of the defendant's breach of contract, nor had a re-sale been contemplated by the parties at the time when the contract for the new lease was entered into (*e*).

Still more recently, a case arose in which the plaintiff was held entitled to recover a portion, but not the whole, of the costs which he had incurred. The defendant and four other joint owners of an estate had advertised it for sale, referring persons who wished to treat to, amongst other persons, the defendant. The latter representing that he had authority from his co-owners to do so, contracted to sell it to the plaintiff for 10,500*l.*, and sent him an abstract of title. The other owners declined to complete at that price. The defendant wrote to the plaintiff that there had been a misunderstanding, and that he had thought that he was authorised to sell subject to the preparation of a proper contract, but that it now appeared that other parties interested took a different view of the matter. The estate was sold to some one else for 10,700*l.*, and the plaintiff brought an action against the defendant and his co-owners for breach of contract. He administered interrogatories and obtained answers on oath from all the joint owners, that they had not authorised the defendant to sell, though they had sanctioned the advertisement. The defendant's answer was that he had had no express authority, but had expected that his co-owners would concur in a sale for 10,500*l.* The plaintiff continued the action, contending that the owners were bound by the advertisement, but was nonsuited. He then sued the defendant, and was held entitled to recover first, the expenses of investigating the title; secondly, as damages for the loss of his bargain, the difference between the contract price and the market price of the estate, of which market price, the price at which it was afterwards sold was *primâ facie* evidence; and it may be observed that, both in this and the last case cited, the defendant was taken to be in the same position with respect to this head of damage as the vendors

[(*e*) *Spedding* v. *Nevell*, L. R. 4 C. P. 212; 38 L. J. C. P. 133.]

would have been if they had been bound by the contract but had refused to carry it out; thirdly, he was held entitled to the costs of the unsuccessful action up to the time when the answers to the interrogatories had been received and considered by his legal advisers, after which, it became unreasonable for him to proceed; lastly, he was held not entitled to recover for loss on re-sale of horses and cattle which he had bought for the purpose of stocking the land without notice to the defendant and before investigating the title. Stress was laid on the equivocal nature of the letter written by the defendant in which there was no express disclaimer of authority to sell, as showing that the defendant acted reasonably in commencing the action. But after receiving the answers to the interrogatories, he had proceeded not in reliance on the defendant's authority, but on a mistaken view of the law with respect to the extent to which the owners had bound themselves by issuing the advertisement, and the costs so incurred did not flow naturally from the defendant's misrepresentation (*f*). On the same principle that the damage must flow naturally from the breach, a plaintiff was held not entitled to recover the costs of an action where the defendant, believing that he had authority, verbally agreed on behalf of the owners to let a house to the plaintiff for seven years, and gave him possession. The owners gave him notice that the defendant had no authority to let to him, and brought ejectment. The defendant advised him to resist, and he did so, and had a verdict against him. It was held that he could not recover the costs of the action from the defendant, because even if the defendant had had the authority which he professed to have, the plaintiff would have had no defence to the ejectment, the agreement being verbal only, and the plaintiff having, therefore, only a tenancy at will (*g*). And, in another case, the plaintiff being in treaty for the purchase of the good-will of a business was referred to B. for the particulars of the returns. He requested the defendant to make the inquiry, and the defendant, as the jury found, falsely and fraudulently represented to him that B. stated them to average a certain amount. The plaintiff bought the business, and

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[(*f*) *Godwin* v. *Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121.]
[(*g*) *Pow* v. *Davis*, 1 B. & S. 220; 30 L. J. Q. B. 257.]

finding the value to be less than had been represented, without further inquiry sued the vendor for a false representation, but failed, as it turned out that no such representation had been made either by B. or the vendor. The plaintiff, thereupon, sued the defendant, and obtained a verdict for a sum which included the costs of the unsuccessful action; but the Court made absolute a rule to reduce the damages by the amount of the costs, the action having been rashly and improvidently brought. There is a marked distinction as was said by Erle, C. J., between a false assertion by an agent such as was made in this case, and a false assertion by an agent that he has authority to make the contract. In the latter case, it is a natural consequence that an action should be brought, but not so in the former (*h*).]

Distinction between false assertion by agent and false assertion of authority as agent.

There are several cases in which it appears to have been laid down as a general rule, that where goods are sold with a warranty by A. to B., and B. resells with a similar warranty to C., who sues and recovers against him for breach of warranty, B. may recover against A. not only the costs and damages he had to pay C. in the former action, but also his own costs incurred in defending it (*i*). But it has been pointed out by Parke, B. (*k*), that *Lewis* v. *Peake* was decided on the ground, that the plaintiff was not aware at the time he sold the horse, that the warranty was not complied with. Accordingly where plaintiff had purchased a horse of the defendant with a warranty of soundness, and sold it with a like warranty to J. S., and the horse turning out unsound, J. S. brought an action against him, which he defended, and failed; the jury having found that the plaintiff ought to have discovered that it was unsound, at the time he sold it to J. S., it was held that he was not entitled to recover as specific damages the costs incurred by him in defending the former action (*l*).

Case of warranty and re-sale.

[In a case of different character the defendant had employed the plaintiff to manufacture fire bricks for him marked with what was to the knowledge of the defendant, but not of the

Case of defendant's conduct exposing plaintiff to injunction.

(*h*) [*Richardson* v. *Dunn*, 8 C. B. N. S. 655; 30 L. J. C. P. 44.]
(*i*) *Lewis* v. *Peake*, 7 Taunt. 153; *Mainwaring* v. *Brandon*, 8 Taunt. 202; *Pennell* v. *Woodburn*, 7 C. & P. 117.
(*k*) 10 M. & W. 255.
(*l*) *Wrightup* v. *Chamberlain*, 7 Sco. 598.

plaintiff, an infringement of the trade mark of another maker, who, in consequence, filed a bill in Chancery against the plaintiff for an injunction and account. The plaintiff compromised the suit in Chancery and brought an action against the defendant to recover the amount which he had paid and the costs to which he had been put. It was objected on demurrer to the declaration that the plaintiff having acted innocently, might have successfully defended the suit, but the Court of Queen's Bench were of opinion that the proceedings in Chancery were well founded, and, therefore that the plaintiff had a good cause of action for his costs and expenses; and Crompton, J. with the acquiescence of Hill, J., went so far as to say, "If the natural consequence of the act of the defendant is to plunge the plaintiff into a Chancery suit, whatever the result may be, I am not prepared to say that that would not be a sufficient damage to ground an action at law" (*m*).]

Costs allowable when defence sanctioned.

Of course in all such cases as those above mentioned, the defendant in the second action will be liable for the costs of the first, if he has advised or sanctioned a defence being set up; because by directing a defence he has admitted that there were reasonable grounds for defending (*n*). And it would seem that slight evidence upon this point may warrant a jury in finding that the defence was sanctioned. A. sued B. in an action, in which B. would have a remedy over against C.; B. gave notice to C. of the nature of the action, and called on him to come in and defend it. This C. refused to do, but did not forbid a defence being taken. B. suffered judgment by default, and put A. to the proof of his claim, at the writ of inquiry. It was held that there was evidence to go to the jury that C. had sanctioned the defence, and the jury having included these costs in the damages in the action by B. against C., the Court refused a new trial (*o*).

[And in another case, silence on the part of the defendant in the second action, when written to by the defendant in the first action for instructions how to act, was considered a sanction of the defence to the first action (*p*).]

[(*m*) *Dixon* v. *Fawcus*, 3 E. & B. 537; 30 L. J. Q. B. 137.]
(*n*) *Williams* v. *Burrell*, 1 C. B. 402; *Howes* v. *Martin*, 1 Esp. 162.
(*o*) *Blyth* v. *Smith*, 5 M. & G. 405.
[(*p*) *Rolph* v. *Crouch*, L. R. 3 Ex. 44; 37 L. J. Ex. 8.]

Tenant holding over.

[A landlord being entitled to recover from his tenant all the loss which he may sustain by not being put in possession of the premises at the end of the term, he can recover the costs of ejecting an undertenant who holds over, though it be against the will of the tenant (*q*); and where a tenant held over and an action was consequently brought against the landlord by a person to whom he had agreed to let the premises in the ordinary way, the landlord was held entitled to recover from the old tenant the damages and costs which he had to pay the new tenant, and likewise his own costs of defending the action up to a point which was found to be reasonable (*r*).]

But not when action brought for plaintiff's own wrong.

In no case can the costs of defending an action be recovered when that action is brought, not merely for the wrongful act of the defendant in the second action, but also for some wrongful act of the original defendant himself. Covenant by assignee of lease containing covenant to repair, against lessee, who had covenanted with him that he had repaired; breach that he had not repaired, in consequence of which, plaintiff, who had himself assigned over with a similar covenant, had been sued by his assignee, and forced to pay 120*l.* to settle. The jury in the second action found that the plaintiff had only been damnified by the breach of defendant's covenant to the extent of 50*l.* On leave reserved to add the costs plaintiff had incurred in the former action, the Court held, that as the amount paid in it was greater than that found by the jury to have been the damage caused by the defendant's non-repair, the difference must be taken to have been damage caused by the plaintiff's own non-repair. This being so, the defence of the action brought against him by his assignee, and the costs so incurred, were not the necessary consequence of the defendant's breach of contract (*s*). Accordingly several cases have decided, that where A. leases to B. with covenants, as for instance to repair, and B. makes an under-lease to C. with covenants similarly worded, and C. neglects to repair, in consequence of which A. sues B.; B. in his action against C. can only recover as damages the loss caused by the breach of covenant, and not the costs of

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[(*q*) *Henderson* v. *Squire*, L. R. 4 Q. B. 170; 38 L. J. Q. B. 73.]
[(*r*) *Bramley* v. *Chesterton*, 2 C. B. N. S. 592; 27 L. J. C. P. 23.]
(*s*) *Short* v. *Kalloway*, 11 A. & E. 28.

the former action (*t*). In all these cases the covenants, even when identical in words, were really different in substance, because a general covenant to repair is construed to have reference to the condition of the premises at the time when the covenant begins to operate, and when the leases are granted at different times, the covenants would vary substantially in their operation, and different amounts of damages would be recoverable (*u*). But in the case in the C. B., Maule, J., said that, even if the covenants were identical in their effect, still where A. has broken his covenant entered into with B., the loss must be considered to result from that breach, and not from the breach of an independent covenant entered into by A. with C., though for the same object. In all these cases the proper course for the plaintiff would have been to pay the proper amount when demanded before action (*x*), or suffer judgment by default (*y*).

Cases of indemnity.

Cases like those just mentioned, in which a party merely covenants to do a particular thing, are different from those in which he covenants to indemnify some one else against the consequences of his not doing it. In the latter case "the defendants would be responsible, unless they had put themselves into the same condition as the plaintiffs, and saved them from all harm, and amongst other things from the costs of the action brought against them; and if the plaintiffs had desired to be so secured, they might have made themselves safe by taking a covenant of indemnity against any breach of the covenants in the original lease" (*z*). And the reason of this distinction is obvious on referring to the doctrine which is the foundation of all damages, viz., that they must be the natural result of the wrong alleged. A covenant to repair involves no other obligation than simply that the premises should be repaired. Breach of the covenant entails no other injury than that resulting from the disrepair, the measure of which is the sum of money necessary to restore things to the

(*t*) *Penley* v. *Watts*, 7 M. & W. 601; *Walker* v. *Hatton*, 10 M. & W. 249; *Logan* v. *Hall*, 4 C. B. 598; overruling *Neale* v. *Wyllie*, 3 B. & C. 533.
(*u*) *Per* Parke, B., 10 M. & W. 258.
(*x*) 10 M. & W. 258.
(*y*) *Smith* v. *Howell*, 6 Exch. 730.
(*z*) *Per* Parke, B., 7 M. & W. 609.

state in which they should have been kept. But a covenant to indemnify at once leads the mind to contemplate ulterior consequences, the most obvious of which is the risk of an action against the party indemnified, for the non-performance of duties, which the party indemnifying has taken upon himself. Accordingly in an action on a separation bond, by which the trustee indemnifies the plaintiff against debts incurred by his wife after separation, the husband was allowed to recover not only the debt, but the costs of an action against him. And it is not necessary to give the surety notice of the first action: but if notice is given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the debt (*a*). And full costs as between attorney and client will be allowed (*b*). Even in such cases, however, the costs to be recoverable must be necessarily incurred. A man has no right, merely because he has an indemnity, to defend a hopeless action, and put the person guaranteeing to a useless expense (*c*). And although the indorser of a bill of exchange is in a certain sense a surety for the acceptor, there is no such privity between them as will enable the indorser, who has been forced to pay the bill, to recover against the acceptor re-exchange, much less costs incurred by him in an action on the bill (*d*).

[The same principle applies where a person authorises another to do an act in his name and indemnifies him against the consequences. Thus, where a landlord authorised a broker to distrain, and undertook to indemnify him against all costs and charges in respect of any law expenses or actions that might arise or be brought against him, and the broker distrained in a perfectly regular way, but the tenant brought a vexatious and groundless action against him, which he defended, and the tenant was nonsuited, the broker was held entitled to

(*a*) *Duffield* v. *Scott*, 3 T. R. 374; *Jones* v. *Williams*, 7 M. & W. 493.

(*b*) *Smith* v. *Compton*, 3 B. & Ad. 407; [*Howard* v. *Lovegrove*, L. R. 6 Ex. 43; 40 L. J. Ex. 13.]

(*c*) 10 M. & W. 259; *Gillett* v. *Rippon*, 1 M. & M. 406; *Knight* v. *Hughes*, *ibid.* 247.

(*d*) *Dawson* v. *Morgan*, 9 B. & C. 618.

recover from the landlord the costs of defending the action. It was urged that the landlord only bound himself to indemnify against the costs of actions which might be brought on the ground that there was no right of distress, but it was considered that the indemnity extended to all actions to which the broker might be subjected, except for actual misconduct or default of himself or his servants (*e*).]

Costs of action against two.

The last point upon which we need remark is where the first action is against two jointly, and the second is brought by one of the two alone. An instance of this sort occurred where two were indicted for a conspiracy. It was held that if one employed an attorney he might, in an action for malicious prosecution, properly charge the costs of defending both, because each was interested in the acquittal of the other. But if each had a distinct defence, as, for instance, if one alone proved an *alibi*, it was said that the case might be different. There, however, the costs would be easily severable, and the jury would be bound to consider how they should be borne (*f*).

Time to which damages assessed. Not allowed before cause of action arose.

III. The next subject of inquiry relates to the period of time in reference to which damages may be assessed.

It is of course quite clear that no damages can be given on account of anything before the cause of action arose. Therefore where the plaintiff claimed damages for not grinding at his mill from 2 Jac. I. to the 12 Jac. I., and at the same time showed that his title to the mill dated from 11 Jac. I., general damages being given for the plaintiff, the judgment was arrested (*g*). And similarly where the declaration stated that the defendant on the 3rd of August caused the plaintiff's meadow to be overflowed, whereby he lost all the use and profit of it from the 2nd of July (*h*).

Cases of much greater difficulty often arise when the question is up to what time, subsequent to the cause of action, damages may be assessed. Whether they must be limited by the commencement of the action, or may be calculated up to the time of verdict, or to an indefinite period

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[(*e*) *Ibbett* v. *De la Salle*, 6 H. & N. 233 ; 30 L. J. Ex. 44.]
(*f*) *Rowlands* v. *Samuel*, 11 Q. B. 39.
(*g*) *Harbin* v. *Green*, Hob. 189.
(*h*) *Prince* v. *Moulton*, Lord Raym. 248.

Rule where damage has arisen since action brought.

afterwards. The result of these decisions seems to be, that damages arising subsequent to action brought, or even to the date of verdict, may be taken into consideration, where they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action. Hence, where an action was brought by a master for an injury to his apprentice, he was allowed to receive such damages as would compensate him for the loss of service during the remainder of the term, for such subsequent loss could never form the ground of a fresh action, the action being founded not upon the damage only, but upon the unlawful act and the damage (*i*). And, on this principle, where a plaintiff, who had recovered in a previous action for assault and battery, brought a fresh action upon another piece of his skull coming out, it was held that the former recovery was a bar, and Holt, C. J., said, "Every new dropping is a new nuisance, but here is not a new battery, and in trespass, the grievousness or consequence of the battery is not the ground of the action, but the measure of damages which the jury must be supposed to have considered at the trial" (*k*). This doctrine has been applied in some very recent cases. In one the facts were, that the defendant had excavated up to the borders of his own mine, and then made an aperture in the plaintiff's, through which water continued to flow into the mine of the latter. It was held, first, that there was no legal obligation upon the defendant to fill up the aperture so made, and that the leaving it open did not amount to a continuing nuisance; secondly, that a recovery in a former action for making the aperture barred all consequential damages from its remaining open (*l*). In another case the declaration was for mining under the plaintiffs' dwelling, and depriving it of the support to which it was entitled. The plea stated a former action for the same cause, and accord and satisfaction; to this plea the plaintiffs new assigned, stating that in consequence of the same acts in respect of which the agreement was entered into, but after that agreement, fresh injury had arisen to their premises. This

(*i*) *Hodsoll* v. *Stallebrass*, 11 A. & E. 301, 305.
(*k*) *Fetter* v. *Beale*, 1 Salk. 11.
(*l*) *Clegg* v. *Dearden*, 12 Q. B. 576.

new assignment was demurred to, and judgment given for the defendant: Parke, B., said, "We think this action is for an injury to a right, and consequently there was a complete cause of action when the wrong was done, and not a new cause of action when damage was sustained by reason of the original wrong. When so much of the stratum was taken away as to deprive the plaintiffs' house of the support to which the plaintiffs were entitled, a cause of action accrued, although no actual damage occurred by the sinking of the land or the falling of the house, or any part of it, or even by part of the structure being cracked or displaced; although it would not be easy to prove that an essential part of the support was withdrawn, unless some actual effect upon the land or structure was produced. For this wrong the plaintiffs would have a right to recover a full compensation including the probable damage to the fabric, and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if instead of having a verdict they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong" (*m*). [And though this case has been overruled as to so much of the judgment as states that the cause of action arises in such cases when the excavation which diminishes the support to the plaintiff's land is made and before actual damage is sustained, and it has since been declared by the House of Lords that the cause of action arises when the mischief actually occurs (*n*), the decision that actual damage having been sustained before the commencement of the first action, no second or fresh action can be brought for subsequent accruing damages remains unimpeached (*o*).] And so where the defendant had engaged the plaintiff to travel with him as his courier, the engagement to commence on a future day, and before that day had arrived, refused to employ him, the Court of Queen's Bench decided that the plaintiff might sue at once, and that

(*m*) *Nicklin* v. *Williams*, 10 Exch. 259; 23 L. J. Exch. 335, S. C.

[(*n*) *Backhouse* v. *Bonomi*, 9 H. L. Cases, 503; 34 L. J. Q. B. 181, *ante*, p. 7.]

[(*o*) *Ib.*, *per* Lord Westbury, C., 9 H. L. Cases, at p. 512, and see *per* Willes, J., in Ex. Ch. E. B. & E. at p. 658; 28 L. J. Q. B. at p. 381; *Hamer* v. *Knowles*, 6 H. & N. 454; 30 L. J. Ex. 102.]

in assessing damages the jury would be justified in looking at all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the time of trial (*p*).

Negligence of attornies.

In suits against attornies for breach of duty, the negligence is the cause of action and not the consequential injury (*q*); no fresh suit can be brought upon the accrual of fresh loss; hence it follows that in such cases the jury may give as damages, not only what has been, but what may naturally be, the result of the wrong complained of, for otherwise there would be no redress.

Interest.

In all actions upon contracts for a principal sum and interest, both shall be included in the judgment up to the time when the plaintiff is entitled to sign it, for the interest is an accessory to the principal, and he cannot bring an action for any interest grown due between the commencement of his action and the judgment in it (*r*). And this in the invariable practice in actions on bills of exchange and other debts which carry interest (*s*).

As an instance of probable future loss being taken into consideration, I may mention a case where the agreement was, that the defendant should appoint the plaintiff to the command of one of his ships, which was chartered by the East India Company for two voyages. It appeared that it would be discretionary with the Company to allow him to command on the second voyage; but they generally permitted such appointments to be renewed. It was held that the jury might give damages for the loss of both voyages, though the time for the second had not yet arrived (*t*).

Evidence of specific damage after action.

The rule in all these cases seems to be, that general evidence of matter accruing subsequent to the action may be used for the purpose of showing what was the natural and probable

(*p*) *Hochster* v. *De Latour*, 2 E. & B. 678; 22 L. J. Q. B. 455. [The promisee may, in such a case, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss; *Frost* v. *Knight*, L. R. 7 Ex. at p. 113; 41 L. J. Ex. at p. 79, in Ex. Ch.]

(*q*) *Short* v. *M'Carthy*, 3 B. & A. 626; *Howell* v. *Young*, 5 B. & C. 259.

(*r*) *Johnson* v. *Bland*, 2 Burr. 1087.

(*s*) 2 Wms. Saund. 171 d, n. (*g*). [2 Wms. Notes to Saund. 499.]

(*t*) *Richardson* v. *Mellish*, 2 Bing. 229.

result of the defendant's conduct; but that particular facts are not admissible, as a specific ground of damage, to be atoned for on their own account. Hence, in an action of libel against a master of a ship, as to his way of business, evidence was received of a falling off in the profits of his next voyage, although it took place four months after action brought; this being merely a mode of estimating the damage likely to flow from the publication of the libel (*u*). But in another case of libel, it was held that evidence could not strictly be given of a specific result, such as the arrest of the plaintiff subsequent to the commencement of the suit, in consequence of the defamatory words; if, however, no objection was made by defendant's counsel, it might fairly be left to the jury as showing the probable effects of the libel, and would perhaps prevent a second action (*v*).

Damage not recoverable, where

On the other hand, where the damages subsequent to the commencement of the action are not the necessary result of the alleged wrong, or where they might be the foundation of a fresh action, they cannot be included in the verdict of the jury.

subsequent injury not necessary result of defendant's act,

The first point was the ground of the decision in *Hambleton* v. *Veere* (*x*), where the action was for procuring the plaintiff's apprentice to depart from his service, and for the loss of his service for the whole residue of the term of his apprenticeship, which had not yet expired. General damages were given and judgment arrested. Here it was not the inevitable result of the defendant's act that the apprentice should continue permanently absent, because possibly he might return (*y*). And so where the declaration was against an apprentice for going away before his time, whereby the plaintiff lost his services for the said term, which was also unexpired (*z*). This case would also have been open to the second objection, viz., that a fresh action would lie against him for every day he remained absent (*a*).

(*u*) *Ingram* v. *Lawson*, 8 Sco. 471.
(*v*) *Goslin* v. *Corry*, 8 Sco. N. R. 21.
(*x*) 2 Wms. Saund. 170. [2 Wms. Notes to Saund. 491.]
(*y*) See *per* Littledale, J., 11 A. & E. 305. [And so *Lewis* v. *Peachey*, 1 H. & C. 518; 31 L. J. Ex. 496.]
(*z*) *Horn* v. *Chandler*, 1 Mod. 271.
(*a*) 11 A. & E. 304.

Upon the second ground many cases have been decided. A plain application of the rule was in a case where, upon the execution of a writ of inquiry against the defendant for necessaries supplied to his sons, the jury took into consideration goods furnished up to a date after the writ of inquiry (*b*). So where in an action for false imprisonment, damages were given for a continuance of the imprisonment after the commencement of the action (*c*); for every instant of detention without just cause is a new capture (*d*). In cases, too, of nuisances and continued trespasses upon land, as each instant the nuisance or trespass is continued is a fresh ground of action, it is clear the jury cannot give damages beyond the commencement of the existing suit (*e*). So, too, where the act done is itself innocent, as digging upon one's own land, but a consequential damage ensues to another, which gives a ground of action, then a fresh cause for suit arises upon each fresh damage. Consequently, each instance of damage must be assessed on its own account, and future damage cannot be considered (*f*). Where, however, the original act done was itself a trespass, but is done by a person or body who are protected by statute from any suit for anything done under their powers, unless brought within a particular time "after the act done," no suit can be brought for any continuance of such trespass; nor for any consequential damage resulting from it after the period of limitation (*g*). It would

or ground of new action.

Nuisances, and continuing trespass.

(*b*) *Baker* v. *Bache*, 2 Ld. Raym. 1382.

(*c*) *Brasfield* v. *Lee*, 1 Ld. Raym. 329; *Hanbury* v. *Ireland*, Cro. Jac. 618.

(*d*) *Withers* v. *Henley*, Cro. Jac. 379.

(*e*) *Per* Holt, C. J., *Fetter* v. *Beale*, 1 Salk. 11; *Rosewell* v. *Prior*, 2 Salk. 460; *Holmes* v. *Wilson*, 10 A. & E. 503; *Hudson* v. *Nicholson*, 5 M. & W. 437; *Thompson* v. *Gibson*, 7 M. & W. 456; [*Battishill* v. *Reed*, 18 C. B. 696; 25 L. J. C. P. 290; *Bankart* v. *Houghton*, 28 L. J. Ch. 473; 27 Beav. 425.]

(*f*) *Roberts* v. *Read*, 16 East, 215; *Gillon* v. *Boddington*, Ry. & M. 161, explained 1 B. & Ad. 393. [See, however, *Bonomi* v. *Backhouse*, *ante*, p. 60.]

(*g*) *Wordsworth* v. *Harley*, 1 B. & Ad. 391; *Ld. Oakley* v. *Kensington Canal Co.*, 5 B. & Ad. 138. [But where, in such a case, the maintenance of works in an inefficient condition causes a recurring injury to the plaintiff, as, for example, by flooding his colliery in rainy weather, a jury are not to give damages on the assumption that the works will be continued in an inefficient condition; and a continuance of the wrongful act with fresh damages will constitute a fresh cause of action; *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765; 30 L. J. C. P. 305.]

follow, then, that damages in the first action ought to constitute a full satisfaction for any injury that could reasonably and naturally spring from it; for otherwise an injustice would be done to the plaintiff. And here a curious difficulty might arise; for, although no fresh action can be brought after the period of limitation has run out, there is nothing to prevent a series of actions being brought during this period, since, except so far as the statute interferes, the case would come under the rule as to continuing trespasses laid down above (*h*).

In fact, the whole law upon the subject of damages in the case of continuing nuisances or trespasses, seems in a very unsatisfactory state. Suppose the defendant to have built a house on the plaintiff's ground, this is a continuing trespass; and as long as it lasts the plaintiff may bring fresh actions, and obtain fresh damages. Indeed he must do so, because it would appear each action can only reimburse him for the loss sustained up to its commencement. The defendant cannot protect himself against this succession of attacks, because even if it were his desire, it is not in his power to enter the plaintiff's land and put an end to the nuisance himself (*i*). The fair rule in such a case would be, to give the plaintiff such damages as would compensate him for the loss sustained up to the time of verdict, and would pay him for putting the land into its original state. If he chose to leave the trespass after this, it would clearly be because he thought it advantageous to himself; and if so, he ought not to be allowed to sue again. There is one case which is almost in accordance with this view. It was an action on a covenant to repair premises, and judgment for plaintiff on demurrer. The premises had got into worse repair since the commencement of the action, and the jury, in assessing damages, computed the expense the plaintiff had been at in doing repairs which became necessary between action brought and writ of inquiry. The judgment upon this point was affirmed in error (*k*). It is quite clear in this case that there was a new breach of covenant in allowing the premises to go into worse repair since the issuing of the writ, for which a new action might have been brought, and new damages

(*h*) *Holmes* v. *Wilson*, &c.
(*i*) *Anthony* v. *Haney*, 8 Bingh. 186.
(*k*) *Shortridge* v. *Lamplugh*, 2 Ld. Raym. 803.

recovered. The jury, however, took the common sense view of the matter, and gave, as every jury practically does, such damages as would reimburse him for all loss incurred up to the time the case came under their cognisance.

Liability to pay money may be allowed for.

Where the wrong complained of has involved the plaintiff in a legal liability to pay money to a third party, the amount of this liability may be included in the damages, though not yet paid by the plaintiff (*l*). But it is otherwise where the obligation, though a moral, is not a legal one. Therefore, where the declaration was for wounding the plaintiff's son, whereby the plaintiff had been put to great expense in medicines, &c., for his cure; it was held, that as to the surgeon's bill, the jury were to consider the amount as paid by the plaintiff, since the surgeon could compel the payment of it; but that the physician's fees could not be taken into account, since they had not been actually paid, and he could not enforce them (*m*).

As to the consequence of a declaration claiming on its face damages for a period after action, or before the cause of action arose, see *post*, p. 434.

Mitigation of damage

IV. It now remains to discuss the cases in which evidence may be given in mitigation of damages.

must be pleaded if possible.

The leading principle upon this question is, that matter which if pleaded would have gone in bar of the action, cannot be given in evidence to reduce damages unless pleaded. Therefore where the action is for wrongfully discharging the plaintiff from the defendant's service, and the defendant only pleads payment into court, he cannot show, in mitigation of damages, that he discharged the plaintiff for misconduct. In an action of assault against the sheriff, if he pleads not guilty only, he cannot for the same purpose give evidence of his writ (*n*). So where the action was against a captain of a ship for assault and imprisonment, evidence that the plain-

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(*l*) *Mason* v. *Barker*, 1 C. & K. 100, 101; *Smith* v. *Howell*, 6 Exch. 730; [*Randall* v. *Raper*, E. B. & E. 84; 27 L. J. Q. B. 266.]

(*m*) *Dixon* v. *Bell*, 1 Stark. 287. [Now by 21 & 22 Vict. c. 90, s. 31, physicians, if registered, may recover their fees under a bye-law of the College of Physicians, passed under this section. Fellows of the College are prevented from suing, but this does not extend to members. See *Gibbon* v. *Budd*, 2 H. & C. 92; 32 L. J. Ex. 182.]

(*n*) *Speck* v. *Phillips*, 5 M. & W. 279, 281.

tiff was one of the crew, and that the acts charged were a punishment for his misconduct, was excluded (*o*). Nor in trover can the defendant under not guilty be allowed to set up title in a third party (*p*); nor in trespass, a recovery of damages against a co-trespasser who is not sued (*q*); nor in an action for goods bargained and sold, that there was a false representation as to their quality, without a special plea (*r*). The case of payment, which had caused some contradictory decisions when it took place after action brought (*s*), is now provided for by two rules of court (*t*), which enact, that payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar; and that pleas containing a defence arising after the commencement of the action, may be pleaded together with pleas of defence arising before the commencement of the action (*u*).

Payment after action.

Evidence not to operate as a cross action.

The sole object intended to be effected by allowing this species of evidence, is to arrive on the whole at the real worth of the article furnished, where the action is for the price of goods or the like; or the actual damage resulting in the first instance from the defendant's act. This only ought to be paid for. The admission of the evidence is not allowed to operate as a cross-action for any purpose beyond this. Therefore in an action for the price of a ship, which was not built according to specification the defendant might show how much less it was worth in consequence of the breach of contract; but he could not show damage resulting from this breach, and the cost of necessary repairs in consequence. This required a separate action (*x*). And so in an action by a broker for money paid for shares, the defendant was not allowed to set up a conversion of the shares by the broker (*y*).

(*o*) *Watson* v. *Christie*, 2 B. & P. 224. [And see *Pujolas* v. *Holland*, 3 Ir. L. R. 533.]

(*p*) *Finch* v. *Blount*, 7 C. & P. 478.

(*q*) *Day* v. *Porter*, 2 M. & Rob. 151.

(*r*) *Woodhouse* v. *Swift*, 7 C. & P. 310.

(*s*) See *Lediard* v. *Boucher*, 7 C. & P. 1; *Shirley* v. *Jacobs*, 2 B. N. C. 88; *Richardson* v. *Robertson*, 1 M. & W. 463.

(*t*) Pl. Rules, T. T. 1853, 14, 22.

(*u*) See 5 M. & W. 282.

(*x*) *Mondel* v. *Steel*, 8 M. & W. 858.

(*y*) *Francis v. Baker*, 10 A. & E. 642.

Nor can he show quite an independent breach of contract by plaintiff after action brought. Thus in an action against the defendant for not paying for goods at the period agreed on, he could not show in reduction of damages, that the plaintiff, after action brought, had refused to deliver the goods, such delivery not being a condition precedent to his obligation to pay (z). Still less can matter completely collateral, and merely *res inter alios acta*, be so used. Hence where the defendant was sued for injuring the plaintiff's ship by a collision, he could not obtain a reduction of damages on the ground that the plaintiff had recovered from the insurers (a). This would be to allow the wrong-doer to pay nothing, and take all the benefit of a policy of insurance without paying the premium. On the same principle it would be no defence in an action against an annuitant, or any other debtor, that the value of the annuity had been recovered against the plaintiff's attorney in an action for negligence in its negotiation, or that the sheriff had been forced to pay the debt in an action for an escape (b).

There are dicta of two eminent judges which seem to contradict this rule. Trover was brought against the purchasers of goods which had been wrongfully sold by the master of the ship. The purchasers pleaded a former recovery against the shipowners. It appeared that the latter, in the action against them, had suffered a verdict to the value of the ship and freight under 53 G. III. c. 159, which was far less than the value of the goods sold. Bayley, J., said, "Independently of the statute, the jury were not bound to make the full value of the goods the measure of the damages in the former action; they might reasonably give small damages on the ground that an action would lie against the purchasers." And Holroyd, J., concurred, saying, "The probability of a recovery in an action against this defendant might keep down the damages on the count of trover. In an action against a sheriff for an escape, small damages are often given on the ground that the debt is not extinguished; and the whole amount may afterwards be recovered, notwithstanding the recovery against the

(z) *Bartlett* v. *Holmes*, 13 C. B. 630; 22 L. J. C. P. 182.
(a) *Yates* v. *Whyte*, 4 B. N. C. 272, [and see *post*, p. 393, n. (r).]
(b) *Hunter* v. *King*, 4 B. & A. 209.

sheriff" (*c*). I apprehend, however, with great submission that these dicta cannot be relied on. They were quite unnecessary to the decision. That relating to the sheriff is clearly contrary to modern decisions; for it has been expressly ruled that the true measure of damage is the value of the custody of the debtor at the time of the escape, and no deduction ought to be made on account of anything which the plaintiff might have obtained by diligence after the escape (*d*). On principle, too, the doctrine seems equally unsustainable. Every man must pay for the damage caused by his own act. How can this damage be lessened by the fact that the plaintiff might have sued others if he had chosen? The law says, you may exact satisfaction from any one of the parties who have injured you. What right have the jury to say, you shall only get satisfaction by suing all? In cases of tort the law says, damages shall not be apportioned among the wrongdoers (*e*). How can the jury say that they shall? Finally, could any judge leave to the jury, as relevant evidence, facts going to show the collateral liability of other parties? If so, must he not also admit evidence to show that they were not liable, and if liable not solvent, and if solvent out of the jurisdiction? The case seems almost to come to a *reductio ad absurdum*.

Two cases which are frequently cited seem to be reducible to the same rule as to the inadmissibility, in reduction of damages, of extrinsic matter arising subsequent to the cause of action. In one it appeared that the bankrupt had deposited with the defendants, his bankers, a sum of money for the specific purpose of meeting some bills. He was at the time indebted to them in a greater amount than the sum deposited. Instead of applying the money as directed, the defendants placed it to his credit with themselves; the bills were dishonoured at maturity, and the action was brought by the assignees in bankruptcy, for breach of the agreement, to recover the money. It was held that they might recover it all; that as soon as the defendants refused to apply the money

(*c*) *Morris* v. *Robinson*, 3 B. & C. 196, 205, 206.
(*d*) *Arden* v. *Goodacre*, 11 C. B. 371; 20 L. J. C. P. 184. See *post*, p. 357.
(*e*) *Merryweather* v. *Nixan*, 8 T. R. 186.

to the use directed, they were liable to be sued for it in an action for money had and received; that in such an action the fact of his being indebted to them would only be material as entitling them to a set-off; and that as they could not avail themselves of this in answer to an action of special assumpsit, it could not be used in reduction of damages (*f*). In the other case, the bankrupt had given the defendant a bill, drawn by himself, for 600*l.*, which the defendant agreed to discount, retaining 100*l.* and the discount. He never paid the bankrupt anything. The action was, as in the former instance, by the assignees in bankruptcy, for breach of the agreement. The jury gave a verdict for 495*l.*, being the amount of the bill, *minus* the 100*l.* and discount at 10*l.* per cent. This was held to be correct, although the bill had become worthless in consequence of the bankruptcy. Pollock, C. B., said, "If this had been an action of trover for the bill, no doubt it would have been altogether a question for the jury as to the amount of damages. So, also, if it had been an accommodation bill, or the bankrupt's own bill. But this is not a case of trover, but of breach of contract. The defendant promised to deliver to the bankrupt the amount of the bill, *minus* 100*l.* and discount. The bankrupt would have to receive that sum, and his assignees are entitled to recover the same amount which he would have been entitled to receive, had he continued solvent, by reason of the breach of contract" (*g*).

Must not conflict with laws of evidence.

It need hardly be stated that evidence can never be admitted for this purpose which contradicts any established principle of law. For instance, where defendant *by writing* agreed to grant a good and valid lease of premises to the plaintiff, in a suit for breach of this agreement, parol evidence that the plaintiff knew that a good title could not be made out, was properly rejected (*h*). Nor is the rule extended to actions for the amount of an attorney's bill (*i*), unless no benefit whatever has been derived from it; nor to actions for freight, although the defendant had been put to considerable expense in consequence of an unauthorised deviation (*k*); or even where the

Attorney's bill and freight are exceptions to general rules.

(*f*) *Hill* v. *Smith*, 12 M. & W. 618.
(*g*) *Alder* v. *Keighley*, 15 M. & W. 117, 119.
(*h*) *Robinson* v. *Harman*, 1 Exch. 850.
(*i*) *Templer* v. *M'Lachlan*, 2 B. & P. N. R. 136.
(*k*) *Bornmann* v. *Tooke*, 1 Camp. 377.

goods had been injured by bad stowage to an extent much beyond the amount of the freight (*l*). These two exceptions seem not to rest upon any principle whatever, but they have been recognised as existing exceptions by the Court of Exchequer (*m*). Where, however, some particular items in an attorney's bill refer to one transaction, and can be shown to have been uselessly incurred, they may be resisted on this ground (*n*).

There is one case in which Lord Ellenborough held at Nisi Prius, that where goods had been sold to defendant by sample at a stipulated price, and an action of *indebitatus assumpsit* was brought against him, he could not, after paying money into court, insist on any defect in the goods (*o*). It is submitted, however, that this decision is not law. It could only be founded on the idea that by paying money into court the defendant admitted his liability upon the particular contract which the plaintiff meant to set up. But it is now settled, after some conflicting decisions, "that this plea amounts to no acknowledgment whatever by the defendant beyond this, that by force of some contract he is bound to pay the plaintiff something on the count for goods sold. But the plaintiff cannot apply that admission to any particular contract which he may wish to select, any more than the defendant" (*p*). In the case referred to, the defendant was clearly liable on a *quantum meruit*, as he had kept the goods. He was not liable on the special contract, as it had been broken, and his plea did not amount to any confession that he was still bound by it.

General rules as to admissibility of evidence in reduction of damages.

Having now cleared away the cases in which evidence is not admissible in reduction of damages, we may proceed to point out those in which it is. Upon this subject the law has undergone considerable change. Formerly where the action was for the agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to a contract, the defendant was never allowed to give its

(*l*) *Sheels* v. *Davies*, 4 Camp. 119.
(*m*) 8 M. & W. 871.
(*n*) *Hill* v. *Featherstonhaugh*, 7 Bingh. 569; *Shaw* v. *Arden*, 9 Bingh. 287.
(*o*) *Leggett* v. *Cooper*, 2 Stark. 103.
(*p*) *Per* Alderson, B., *Kingham* v. *Robins*, 5 M. & W. 94, 102.

inferiority in evidence, but was forced to pay the stipulated amount, and reimburse himself by a cross-action. But it is now settled, that whether the action is for the price of a specific chattel (*q*), or of unascertained goods (*r*), sold with a warranty; or is brought on a special contract to pay for goods (*s*) or work (*t*) at a certain price; or upon a *quantum meruit*, for work and labour done, and materials found (*u*); or for the value of the plaintiff's services (*x*); the defendant may show the actual value of the goods, work, services, &c., and reduce the claim accordingly. So when a plaintiff contracts for a fixed sum to do work and find materials, and part of the work is afterwards done by the employer (*y*), or part of the materials are supplied by him, and used by the plaintiff, he is entitled to a deduction to this extent without pleading set-off (*z*). If it is part of the contract between a servant and his master that the former is to pay out of his wages the value of his master's goods, lost by his negligence, this amounts to an agreement that the wages are to be paid only after deducting the value of the things lost. Such a state of things may be given in evidence under the general issue, and does not require a plea of set-off (*a*). And so where, by the custom of the hat trade, the amount of injury sustained by the hats in dyeing was deducted from the dyer's charges, evidence of injury from this cause was admitted in reduction of damages (*b*).

Principle upon which reduction to be made.

Assuming then that in such cases a reduction might be made, a further question arises as to the principle upon which such a reduction should proceed. In the great majority of cases the simple rule has been to allow for the article as much as the jury should find it was worth. But there are two cases

(*q*) *Street* v. *Blay*, 2 B. & Ad. 456; *Parsons* v. *Sexton*, 4 C. B. 899.
(*r*) *Poulton* v. *Lattimore*, 9 B. & C. 259.
(*s*) *Cousins* v. *Paddon*, 2 C. M. & R. 547; *Milner* v. *Tucker*, 1 C. & P. 15.
(*t*) *Chapel* v. *Hickes*, 2 C. & M. 214.
(*u*) *Basten* v. *Butter*, 7 East, 479; *Farnsworth* v. *Garrard*, 1 Camp. 38.
(*x*) *Denew* v. *Daverell*, 3 Camp. 451; *Baillie* v. *Kell*, 4 Bingh. N. C. 638.
(*y*) *Turner* v. *Diaper*, 2 M. & G. 241.
(*z*) *Newton* v. *Forster*, 12 M. & W. 772.
(*a*) *Per* Ld. Ellenborough, *Le Loir* v. *Bristow*, 4 Camp. 134; *semble Cleworth* v. *Pickford*, 7 M. & W. 314.
(*b*) *Bamford* v. *Harris*, 1 Stark. 343.

in which a different principle was adopted. The one was a contract for supplying a chapel with hot air (*c*); the other was for slating a house (*d*). In both cases the work had not been done according to contract, and it was laid down by Tindal, C. J., and Parke, B., that the measure of reduction should be the necessary cost of making the work conform to the contract. It is evident that this rule differs very much from the former one. A thing may be very valuable in itself, but if it is to be altered into something different, the cost of doing so may absorb its whole price. Which rule is correct? It is suggested that both rules may be so, according to the cases to which they are applied. One important element in this inquiry will be, could the subject-matter of the contract have been returned or not? If it could, then, as the defendant has kept it of his own free will, he ought to pay for it as much as the plaintiff could have sold it for, if he had taken it back; that is, its real value. But there are two cases in which the defendant cannot return it. The one is where the sale is of a specific chattel, upon which the owner has had an opportunity of exercising his own judgment, and which is bought with a warranty (*e*). The other, where labour has been expended upon the defendant's own property, as, for instance, his materials or his land. In the latter case the thing done may in itself possess very great intrinsic value, as, for instance, if a tailor should cut cloth into a coat which would fit any but the owner, or a builder should erect a coach-house where he had been directed to make a stable. But it is clear that the thing would in neither case be of any value to the owner, till it was altered into what he wanted. The cost of altering it would be the only fair measure of reduction. It will be observed that both the cases cited come under this latter head.

The former case, viz., the sale of a specific chattel with warranty, would admit of different considerations. It might be utterly impossible to alter it, as, for instance, to change a hack into a hunter. The question would then be, what was

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(*c*) *Cutler* v. *Close*, 5 C. & P. 337.
(*d*) *Thornton* v. *Place*, 1 M. & Rob. 218.
(*e*) *Parsons* v. *Sexton*, 4 C. B. 899; *Dawson* v. *Collis*, 10 C. B. 523; 20 L. J. C. P. 116.

it worth to the purchaser as it was. This would depend upon what he could get for it, and so would come under the former rule as to real value. On the other hand it might be capable of alteration at a very exorbitant cost, as, for instance, a defective machine. Ought the purchaser to sell it for what it would fetch, supposing it to be useless to him in its present condition, or may he alter it to suit his requirements? This would probably depend upon the facts of each case. If he could without very great loss and inconvenience procure another, it would perhaps be held that he ought to do so, and that great expense incurred in alterations could not be treated as the necessary result of the plaintiff's breach of warranty, when by a smaller outlay he could have obtained a perfect article. But it might be impossible to procure another, or the cost and delay might be so great as to warrant him in altering it at a very great expense; if so, it might fairly be held that the exception laid down in the above cases applied, and that the measure of reduction was the cost of alteration. It must be owned, however, that such a case would hover upon the limits of the rule laid down against reduction of damages in *Mondel* v. *Steel* (*f*).

Evidence in mitigation of apparent injury inflicted by defendant.

In the cases hitherto under discussion the plaintiff has been claiming payment on account of something done by him for the defendant, and the evidence has gone to show that the defendant had not received all the benefit for which he had bargained. On exactly the same principle, where the action is to recover damage for some loss arising from the defendant's acts, evidence is admissible to show that the injury is not so great as would at first appear (*g*). For instance, where the action was for breach of an agreement to build upon land, the defendant was allowed to show that the plaintiff had re-entered upon it under the covenant, and let it to another tenant (*h*).

Indemnity.

And where the plaintiff has given the defendant an indemnity

(*f*) *Ante*, p. 66.

[(*g*) In *Workman* v. *Great Northern Ry. Co.*, 32 L. J. Q. B. 279, in consequence of the defendants' embankment the flood waters of a river were pent back and flowed over the plaintiff's land. Had the embankment not been constructed the waters would have flowed a different way, but would have reached the land and done damage to a lesser amount. The measure of damages was held to be the difference only between the two amounts.]

(*h*) *Oldershaw* v. *Holt*, 12 A. & E. 590.

against the very demand for which he is suing, such indemnity is a bar to the action, if it goes to the entire claim (*i*), and of course would be admissible in reduction of damages if it only went to part. So in trover, though the cause of action is complete upon proof of conversion, still if the defendant after using the goods has returned them (*k*), or has paid over part of the proceeds to the plaintiff, this will go in reduction of damages (*l*). And in trespass against an executor de son tort, payments made by him in a due course of administration and which go to exonerate the estate, shall be recouped in damages (*m*).

Trover.

Trespass.

Crim. con.

For the same reason, [formerly,] in actions of crim. con., any evidence which [went] to show that the husband had suffered a comparatively trifling loss in respect of his wife, either on account of her own worthlessness, previous to the defendant's acquaintance with her (*n*), or his own want of affection for her (*o*), or the slight amount of intercourse that subsisted between them (*p*), [was admitted] to reduce the damages; so in actions for breach of promise of marriage, proof may be given that the plaintiff was utterly unfit to appreciate the person to whom he had engaged himself (*q*), or that the defendant's family disapproved of the match, for this would naturally diminish the happiness to be expected from it (*r*).

Breach of promise of marriage.

So where the defendant has been in the wrong, but the injury resulting from his conduct has been increased by that of the plaintiff; as, for instance, in an action against the sheriff for an escape, if he has done anything to aggravate the loss occasioned by the defendant's neglect, or has prevented him from re-taking the debtor, the damages would be materially affected by such conduct (*s*).

Of course in all cases where motive may be ground of

(*i*) *Connop* v. *Levy*, 11 Q. B. 769.
(*k*) *Cook* v. *Hartle*, 8 C. & P. 568.
(*l*) *Burn* v. *Morris*, 2 C. & M. 579.
(*m*) *Mountford* v. *Gibson*, 4 East, 441.
(*n*) *Smith* v. *Allison*, B. N. P. 27.
(*o*) *Duberley* v. *Gunning*, 4 T. R. 655; *Bromley* v. *Wallace*, 4 Esp. 237.
(*p*) *Calcraft* v. *Ld. Harborough*, 4 C. & P. 499.
(*q*) *Leeds* v. *Cook*, 4 Esp. 256.
(*r*) *Irving* v. *Greenwood*, 1 C. & P. 350.
(*s*) *Arden* v. *Goodacre*, 11 C. B. 371, 377; 20 L. J. C. P. 184.

aggravation, evidence on this score will also be admissible in reduction of damages. Hence in an action for false imprisonment, evidence may be given of a reasonable suspicion that the plaintiff had been guilty of felony, without any attempt at setting up a justification (*t*). [And if the plaintiff was given into custody for an offence not justifying an arrest, evidence may be given of the offence (*u*).] It is in the nature of an apology for the defendant's conduct (*x*). And so in cases of libel, the defendant may give any evidence in reduction of damages which goes to prove the absence of malice (*y*), or he may show previous provocation received from the plaintiff (*z*). And in actions of seduction, the offence may be deprived of its wanton and heartless aspect by showing the loose character of the female (*a*).

False imprisonment.

Libel.

Seduction.

It would be easy to multiply illustrations upon all the heads just mentioned. Those adduced, however, are sufficient to explain the principles upon which damages may be reduced. We shall have occasion to go more fully into the subject in discussing the different species of actions.

The law of set-off does not, perhaps, come strictly within the scope of a work on damages, since it is merely a cross-action, which, by means of a statute, may be tried at the same time with the principal suit. Still it is a means by which the plaintiff's claim may be cut down or negatived; and as it is important with a view to damages that he should know what demands may be set up against him, it may be as well to point out the chief bearings of the subject.

Set-off.

The law of set-off in ordinary cases, and that of mutual credit in bankruptcy, differs in some important particulars, which makes it advisable to consider them separately.

Stat. 2 G. II. c. 22, s. 13, enacts, "That where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator and intestate and either party, one debt may be set against the other, and such matter

Statutes 2 G. II. c. 22, s. 13;

(*t*) *Chinn* v. *Morris*, 2 C. & P. 361.
[(*u*) *Linford* v. *Lake*, 3 H. & N. 276; 27 L. J. Ex. 334.]
(*x*) *Per* Ld. Abinger, *Warwick* v. *Foulkes*, 12 M. & W. 507.
(*y*) *Pearson* v. *Lemaitre*, 5 M. & G. 700.
(*z*) *May* v. *Brown*, 3 B. & C. 113.
(*a*) *Bamfield* v. *Massey*, 1 Camp. 460; *Dodd* v. *Norris*, 3 Camp. 519.

be given in evidence upon the general issue, or pleaded in bar as the nature of the case shall require." This statute was made perpetual by 8 G. II. c. 24, which further enacted, to remove doubts which had arisen, "That mutual debts may be set against each other, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases when either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

8 G. II. c. 24.

Must be pleaded.

I need hardly observe that now set-off must always be specially pleaded (*b*).

To ascertain whether any particular claim may be the subject of a set-off under the above statutes, it is necessary to inquire, first, in what actions the plea is admissible; secondly, what is the nature of the demand which may be set off; thirdly, at what time it must be due; fourthly, in whose right it must become due.

No set-off in actions for unliquidated damage.

1. The statute only allows debts to be set off; therefore the plea is bad when the action is for breach of agreement, where the damages are unliquidated, as for instance on a promise to indemnify (*c*), though contained in a bond, conditioned for the payment of a certain penalty (*d*); on a policy of insurance for an average or partial loss (*e*), even though the amount has been adjusted at a fixed sum before action brought; because the adjustment is only a means for enabling the jury to fix the amount for which the plaintiff sues in the

(*b*) Reg. T. T. 1853, r. 8.
(*c*) *Hardcastle* v. *Netherwood*, 5 B. & A. 93.
(*d*) *Attwooll* v. *Attwooll*, 2 E. & B. 21.
(*e*) *Grant* v. *Royal Exchange Co.*, 5 M. & S. 439; *Castelli* v. *Boddington*, 1 E. & B. 66; 22 L. J. Q. B. 5; affirmed in error, 1 E. & B. 879; 23 L. J. Q. B. 31.

shape of unliquidated damages, and is not an amount binding upon the parties in all events (*f*). Nor where the action is for not accounting (*g*); for not replacing stock (*h*); for not applying money paid to meet an acceptance (*i*); for not paying over a bill to the person for whose use it was remitted (*k*); for refusing to give a bill of exchange in payment for goods sold, the time of credit not having expired (*l*). Still less can it be pleaded to actions of tort: such as case, trover, detinue, trespass, or replevin (*m*). The same rule applies as to actions by the sheriff upon a bail bond; but it has been said that when the action is brought by the assignee in his own name a set-off might be allowed (*n*). Where, however, the action is on a bond, the condition of which is for the payment of a liquidated sum, such as an annuity, a set-off will be allowed (*o*). [And though the declaration be special and include a claim for unliquidated damages, a defendant may sever so much of the plaintiff's claim as is liquidated, and plead a set-off as to that (*p*).]

Nor where the set-off is itself a matter of unliquidated damage.

2. The same principles exactly apply to the demand which is made the subject of set-off. The rule by which we are to determine whether or not a demand can become the subject of a set-off, is by inquiring whether it sounds in damages; whether the demand is capable of being liquidated, or ascertained with precision at the time of pleading (*q*). The law allows the value of goods sold without any price having been named, to be treated as a set-off; but in that case the law presumes that the goods were sold at the then market value,

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(*f*) *Luckie* v. *Bushby*, 13 C. B. 864.
(*g*) *Birch* v. *Depeyster*, 4 Camp. 385.
(*h*) *Gillingham* v. *Waskett*, M'Clell. 198.
(*i*) *Bell* v. *Carey*, 8 C. B. 887.
(*k*) *Thorpe* v. *Thorpe*, 3 B. & Ad. 580, 584.
(*l*) *Hutchinson* v. *Reid*, 3 Camp. 329.
(*m*) B. N. P. 181; *Sapsford* v. *Fletcher*, 4 T. R. 511; *Laycock* v. *Tuffnell*, 2 Chitt. Rep. 531.
(*n*) *Hutchinson* v. *Sturges*, Willes, 261; B. N. P. 179.
(*o*) *Collins* v. *Collins*, 2 Burr. 820.
[(*p*) *Crampton* v. *Walker*, 3 E. & E. 321; 30 L. J. Q. B. 19; *Brown* v. *Tibbits*, 11 C. B. N. S. 855; 31 L. J. C. P. 206. A set-off may be pleaded to an action on an award; and where a person ordered to pay money under an award had a cross demand, a rule to pay the money awarded was refused; *Swayne* v. *White*, 31 L. J. Q. B. 260.]
(*q*) *Per* Tindal, C. J., *Morley* v. *Inglis*, 4 Bingh. N. C. at p. 71.

which is easily ascertained (*r*). And the price of goods bargained and sold, which the plaintiff has refused to receive, may be set off against a demand by him for goods delivered (*s*). Where in such a case the defendant has resold the goods, it has been decided by Lord Ellenborough, that an action for goods bargained and sold would still lie (*t*). But this case, after being several times doubted, has been overruled (*u*). As the defendant's remedy then is only by an action for unliquidated damages, it cannot form a subject of set-off.

Where the goods of the defendant have been taken in execution, and sold for a debt for which the plaintiff alone was answerable, as between himself and the defendant, the Court of Exchequer intimated a strong opinion that the amount for which they sold might be set off by the defendant as money paid to the use of the plaintiff (*x*).

Guarantee.

No set-off can in general be claimed in respect of a demand upon a guarantee, even after the debt has become due, and while it remains unpaid by the principal (*y*); but where the defendant became a shareholder and director of a company, upon receiving from the plaintiff an indemnity against all expenses which he might incur in consequence of acting as such, it was decided that he might, in an action against him, set off the money he had paid for travelling expenses in attending the meetings of the company as director (*z*). Nor for damages arising from an injury to goods (*a*); or from breach of covenant, as, for instance, to deliver goods (*b*), or to repair (*c*), or to insure (*d*); nor on account of a penal sum, which was stipulated to be paid, on breach of agreement, by the plaintiff to the defendant (*e*). But when the sum is not a penalty but liquidated damages, as where it was agreed

Penalty.

(*r*) *Per* Erle, J., *Castelli* v. *Boddington*, *ubi sup.*
(*s*) *Dunmore* v. *Taylor*, Peake, 41.
(*t*) *Mertens* v. *Adcock*, 4 Esp. 251.
(*u*) *Lamond* v. *Davall*, 9 Q. B. 1030.
(*x*) *Rodgers* v. *Maw*, 15 M. & W. 444; but see *Moore* v. *Pyrke*, 11 East, 52.
(*y*) *Morley* v. *Inglis*, 4 Bingh. N. C. 58.
(*z*) *Hutchinson* v. *Sidney*, 24 L. J. Ex. 25.
(*a*) *Freeman* v. *Hyett*, 1 W. Bl. 394; *Dowsland* v. *Thompson*, 2 W. Bl. 910.
(*b*) *Howlet* v. *Strickland*, Cowp. 56.
(*c*) *Weigall* v. *Waters*, 6 T. R. 488.
(*d*) *Gillett* v. *Mawman*, 1 Taunt. 137.
(*e*) *Davies* v. *Penton*, 6 B. & C. 216.

that if work was not completed at a stated time, a weekly sum should be paid till it was completed, this may be set off (*f*). And the plea must state exactly what sum is due under the agreement, and this averment is material and traversable (*g*).

Freight.

[So in an action for freight the defendant cannot set off a claim in respect of damaged (*h*) or missing goods (*i*); nor for expenses incurred by reason of the captain's refusal to load a portion of the cargo, unless, indeed, they come under the head of demurrage fixed by the charter-party (*k*).]

Goods sold.

When there is an entire contract to supply a particular amount of goods, the purchaser is not bound to take a smaller portion, but if he does take it, the value of such part may be set off against an action by him (*l*), though the defendant is liable to a cross-action for the breach of his contract.

Judgment.

A judgment obtained by one party may be set off against an action by the other party (*m*), or against another judgment, notwithstanding the plaintiff may also have a separate demand on one of the defendants (*n*), and though the judgments are in different courts (*o*). Nor does it make any difference that a writ of error is pending to reverse the judgment (*p*). [And in an action on a judgment, a defendant may set off another judgment by plea, even though the Court would not, on one party proceeding to execution, have interfered to allow a set-

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(*f*) *Fletcher* v. *Dyche*, 2 T. R. 32; *Duckworth* v. *Alison*, 1 M. & W. 412; *Legge* v. *Harlock*, 12 Q. B. 1015; and see *Parkes* v. *Smith*, 15 Q. B. 297. As to the rules for distinguishing between a penalty and liquidated damages, see *post*, p. 99, *et seq.*

(*g*) *Symmons* v. *Knox*, 3 T. R. 65.

[(*h*) *Dakin* v. *Oxley*, 15 C. B. N. S. 646; 33 L. J. C. P. 115. In the United States a set-off is allowed in case of culpable sea damage: *per* Willes, J., citing 1 Parsons on Maritime Law, 172, n.]

[(*i*) *Meyer* v. *Dresser*, 16 C. B. N. S. 646; 33 L. J. C. P. 289. The claim cannot be set up as an equitable defence; *Stimson* v. *Hall*, 1 H. & N. 831; 26 L. J. Ex. 212; nor can the general law be altered by any alleged universal practice of merchants, not confined to any particular place or trade, to have the value of missing goods deducted from the freight. The law of set-off is a matter of procedure, and governed by the law of the country where the remedy is sought. *Ib.* and *Dakin* v. *Oxley*, *supra*.]

[(*k*) *Seeger* v. *Duthie*, 8 C. B. N. S. 45; 29 L. J. C. P. 253.]

(*l*) *Shipton* v. *Casson*, 5 B. & C. 378.

(*m*) *Stanton* v. *Styles*, 5 Exch. 578.

(*n*) *Glaister* v. *Hewer*, 8 T. R. 69.

(*o*) *Barker* v. *Braham*, 3 Wils. 396; *Bridges* v. *Smyth*, 8 Bingh. 29.

(*p*) *Reynolds* v. *Beerling*, 3 T. R. 188, n.

off (*q*).] A verdict before judgment cannot be set off (*r*); and in such a case the Court will not stay proceedings, until a motion for a new trial has been disposed of, in order to enable the defendant to sign judgment, and set off his damages and costs against the costs of the action (*s*). Still less will they stay execution on a judgment that has actually been obtained, until a cross-action is determined, that one may be set off against the other (*t*). On the other hand, a judgment upon which the defendant has taken the plaintiff in execution is *ipso facto* satisfied, and cannot be made the subject of a set-off (*u*). The rule is the same when the prisoner is discharged by consent of the creditor, upon giving a fresh security for the judgment, even though the security itself proves void, on account of some informality (*x*).

Order of Nisi Prius.

Money due under an order of Nisi Prius may also be set off (*y*).

Set-off where the debtor promises to pay ready money.

It is no answer to a plea of set-off, that the money for which the action is brought was lent, or the goods delivered, upon an express promise to pay ready money (*z*). But where there has been such a promise, an offer to set-off a debt will not entitle a party to bring trover for the goods, before the lien of the holder is satisfied (*a*).

Debt must be due.

3. The debt, which it is attempted to set-off, must be completely due at the time of action brought (*b*). Therefore a note cannot be set off before it has reached maturity (*c*). Nor a judgment which was recovered after the commencement of the suit, but before plea (*d*). Nor is a mere liability to

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[(*q*) *Mercer* v. *Graves*, Weekly Notes, May 4th, 1872. There the set-off was to the prejudice of the attorney's lien on the judgment for his costs. As to setting off costs and damages in equity, see *Throckmorton* v. *Crowley*, L. R. 3. Eq. 196. See, as to set-off against the assignee of a judgment, *post*, p. 85, note (*p*).]

(*r*) *Garrick* v. *Jones*, 2 Dowl. 157.

(*s*) *Johnson* v. *Lakeman*, 2 Dowl. 646.

(*t*) *Williams* v. *Cooke*, 10 Moo. 321.

(*u*) *Taylor* v. *Waters*, 5 M. & S. 103. [But see *Thompson* v. *Parish*, 5 C. B. N. S. 685; 28 L. J. C. P. 153.]

(*x*) *Jacques* v. *Withy*, 1 T. R. 557.

(*y*) *Newton* v. *Newton*, 8 Bingh. 202.

(*z*) *Lechmere* v. *Hawkins*, 2 Esp. 626; *Cornforth* v. *Rivett*, 2 M. & S. 510.

(*a*) *Clarke* v. *Fell*, 4 B. & Ad. 404.

(*b*) *Braithwaite* v. *Coleman*, 4 N. & M. 654.

(*c*) *Rogerson* v. *Ladbroke*, 1 Bingh. 93.

(*d*) *Evans* v. *Prosser*, 3 T. R. 186.

pay money for the plaintiff sufficient, unless it actually was paid (*e*). But although an attorney cannot maintain an action on his bill of costs, till one month after delivery, it may be made the subject of set-off, if delivered less than a month before the action against him was commenced, provided sufficient time has elapsed to allow of its being taxed (*f*), [or even though no bill have been delivered, the Court having power in case of hardship to stay proceedings, so as to allow proper taxation before trial (*g*).]

Must remain due.

The debt must not only have become due at the commencement of the suit, but it must continue due then. Therefore a debt cannot be set off which is barred by the Bankrupt or Insolvent Acts (*h*); or by the Statute of Limitations (*i*); or which has been paid off since the plea of set-off was put in (*k*).

Must be due in the same right.

4. The debt sued for, and that intended to be set off, must be mutual, and due in the same right, and there can be no set-off where either of the debts is due in *auter droit* (*l*). Therefore a joint debt cannot be set off against a separate one, nor a separate against a joint debt (*m*), and a violation of this rule may be taken advantage of under the replication never indebted (*n*). But where there has been an express agreement, debts of this nature may be set against each other (*o*). Where the action appears on its face to be for a debt due from one, the defendant may plead that he was jointly liable to the plaintiff with another who is not sued,

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(*e*) *Leman* v. *Gordon*, 8 C. & P. 392.

(*f*) *Bulman* v. *Birkett*, 1 Esp. 449; *Martin* v. *Winder*, 1 Doug. 199, n.; *Lester* v. *Lazarus*, 2 C. M. & R. 669.

[(*g*) *Brown* v. *Tibbits*, 11 C. B. N. S. 855; 31 L. J. C. P. 206.]

(*h*) *Hayllar* v. *Sherwood*, 2 Nev. & M. 401; *Francis* v. *Dodsworth*, 4 C. B. 202.

(*i*) *Mead* v. *Bashford*, 5 Exch. 336; *Walker* v. *Clements*, 15 Q. B. 1046.

(*k*) *Eyton* v. *Littledale*, 4 Exch. 159.

(*l*) *Gale* v. *Luttrell*, 1 Y. & J. 180.

(*m*) *France* v. *White*, 6 Bingh. N. C. 33.

(*n*) *Arnold* v. *Bainbrigge*, 9 Exch. 153. [By s. 19 of the Common Law Procedure Act, 1860, all persons supposed to be legally entitled may be joined as plaintiffs; and by s. 20, a defendant may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more may have been improperly joined, or that the plaintiffs who establish their right to maintain the cause are indebted to him.]

(*o*) *Kinnerley* v. *Hossack*, 2 Taunt. 170.

and that they are willing to set off a debt due to them from the plaintiff against his present demand (*p*).

Partners.

On the other hand, a debt due to defendant, as a surviving partner, may be set off against a demand on him in his own right (*q*), and *vice versâ*, a debt due from the plaintiff, as surviving partner, may be set off against a demand by him in his own right (*r*). So where by the terms of the partnership the plaintiff is to be the only ostensible trader, the others being mere sleeping partners, a separate debt due from him may be set off against a debt due to the firm, of which he is the manager (*s*). In such a case, however, it is not sufficient merely to show that the defendant was ignorant of the existence of other partners. Therefore where to an action by a firm for money had and received, the defendant pleaded that the money was the proceeds of the sale of goods, which one of the partners had employed him to dispose of; that at the time of the sale the defendant believed that his employer was the sole owner of the goods, and entitled to receive their proceeds for his exclusive use, and had no notice of the rights of the other partners; and that after he was so employed, and before he had any notice of the rights of the other partners, his employer became indebted to him in an amount which he offered to set off; the plea was held bad, because it did not appear that the person who employed the defendant had appeared to be the sole owner of the goods, with the assent of his partners, or that there had been any laches or default on their part (*t*).

Joint and several note or bond.

A joint and several [promissory note (*u*) or] bond is the separate debt of both, and may be set off against either, and it would be the same in the case of a bond intended to be joint, but only executed by one. No debt can arise from the non-executing party, and therefore it may be set off against a demand by the other (*x*).

Husband and wife.

When the husband is sued on his own debt, he cannot set

(*p*) *Stackwood* v. *Dunn*, 3 Q. B. 822.
(*q*) *Slipper* v. *Stidstone*, 5 T. R. 493.
(*r*) *French* v. *Andrade*, 6 T. R. 582.
(*s*) *Stracey* v. *Deey*, 7 T. R. 361, n.
(*t*) *Gordon* v. *Ellis*, 2 C. B. 821.
[(*u*) *Owen* v. *Wilkinson*, 5 C. B. N. S. 526; 28 L. J. C. P. 3.]
(*x*) *Fletcher* v. *Dyche*, 2 T. R. 32.

off a debt due to him in right of his wife (*y*). Nor can a debt due from the wife, *dum sola*, be set off against an action by the husband alone, unless he has for some new consideration made the debt his own (*z*). Where a note is given to the wife during coverture, the husband has a right to treat it as joint property, or several. If he chooses to treat it as several, he may sue upon it alone, and the consequence would be to let in, by way of set-off, any debts due from him, but not those due from the wife. If on the other hand he elected to treat it as joint property of himself and his wife, in her right, and joined her in the action, it was the opinion of Bayley, J., that he might let in debts due from her in her own right. But Littledale, J., said that he did not think the latter position by any means clear (*a*).

Executor.

An executor, sued for a debt due from the testator, cannot set off a debt due to himself (*b*), nor can a defendant, sued by an executor, set off a debt due from the executor in his own right (*c*). There are also many cases in which debts due from or to the deceased, cannot be set off against claims in respect of the testator's estate. Debts due from the testator cannot be set off in reply to an action by the executor, for a cause arising after the death of the testator, whether the executor sue in his own name, as he may do (*d*), or as executor; because if in this way he might retain money or goods received since the death, by merely offering a set-off, the course of distribution would be altered, and he might be paid before creditors of a superior nature (*e*). Therefore in a very recent case it was held, that to an action for money had and received by the defendant to the use of the administrator, and on accounts stated between them, a set-off of money lent by defendant to the intestate could not be allowed (*f*). The Court said that in the case

(*y*) *Paynter* v. *Walker*, B. N. P. 179; [*O'Halloran* v. *Studdert*, 1 Ir. C. L. 245.]

(*z*) *Wood* v. *Akers*, 2 Esp. 594; *Burrough* v. *Moss*, 10 B. & C. 558. [And see 33 & 34 Vict. c. 93, s. 12.]

(*a*) *Burrough* v. *Moss*, 10 B. & C. 558, 562.

(*b*) *Bishop* v. *Church*, 3 Atk. 691.

(*c*) Willes, 263.

(*d*) *Shipman* v. *Thompson*, Willes, 103.

(*e*) *Kilvington* v. *Stevenson*, Willes, 264, n.; *Tegetmeyer* v. *Lumley*, *ibid.*; *Schofield* v. *Corbett*, 11 Q. B. 779. [*Lambarde* v. *Older*, 17 Beav. 542.]

(*f*) *Rees* v. *Watts*, 25 L. J. Ex. 30; 11 Ex. 410, affg. *Watts* v. *Rees*, 9 Exch. 696; 23 L. J. Ex. 238.

of actions by or against an executor, it is as necessary as in the case of actions between the principals "that the debts should originally have existed between the two living parties. The executor or administrator, to come within the statute, must sue or be sued necessarily in his representative character. If not, although he may be called executor, he is really a third party introduced, (whereas it is essential that there should be only two concerned) and the mutuality of the debts, without which there can be no set-off, does not exist. Whether the statute in either of its branches extends beyond its mere words to the case of two mutual debtors both dying, and the representative of the one suing the representative of the other, it is not necessary now to decide. In the present case . . . the money was not received to the use of the intestate. The intestate had no claim on the defendant in respect of this receipt, which took place after his death; he and the defendant never stood in the relation of mutual debtors to each other, and consequently there is no set-off between the one and the representative of the other" (*g*).

It has been held that to an action against an executor, on an account stated with him of monies due from him, as executor, a set-off might be pleaded of debts due from the plaintiff to the testator in his lifetime (*h*). This decision seems principally to have rested upon the idea that an account stated by an executor, as such, could only have been stated in respect of a previously existing debt due from the testator (*i*). Upon this ground the Court of Exchequer Chamber in the case last cited were willing to acquiesce in it, though they expressed great doubts of its general soundness. They decidedly overruled another decision of the Queen's Bench, in which it had been ruled that a defendant, sued as executor for a debt which accrued due from the testator in his lifetime, might set off a debt which accrued due to him as executor, since the death of the testator (*k*).

Trustee.

It was formerly held that in an action by a trustee, a debt

(*g*) *Rees* v. *Watts*, 25 L. J. Ex. 30; 11 Ex. 410, affg. *Watts* v. *Rees*, 9 Exch. 696; 23 L. J. Ex. 268.

(*h*) *Blakesley* v. *Smallwood*, 8 Q. B. 538.

(*i*) See *per* Holroyd, J., *Ashby* v. *Ashby*, 7 B. & C. 444, 451.

(*k*) *Mardall* v. *Thelluson*, 21 L. J. Q. B. 410; [18 Q. B. 857; after being thus overruled error was brought in this case, and the decision of the Queen's Bench reversed, 6 E. & B. 976.]

due from the person beneficially interested might be set off (*l*). These cases, however, after being repeatedly doubted, have been expressly overruled (*m*), and the rule laid down that none but legal rights can be regarded. Accordingly the assignee of a bond debt of the plaintiff cannot set it off in an action against himself, in his own right (*n*). And on the same principle, an executrix sued upon a bond given by her testatrix to a trustee, for payment of money to the use of S., was not allowed to set off a bond given by S. to another person, who had made the testatrix his executrix and residuary legatee, the defendant being herself executrix for her own benefit (*o*).

But a judgment, obtained by a party as trustee, cannot be set off against a judgment obtained against him in his individual right (*p*).

Public bodies having banking accounts in different rights.

[In a recent case a municipal corporation being also the local board of health under the Public Health Act, 1848, and Local Government Act, 1858, kept separate accounts at their banker's for municipal and local board affairs. Being sued for the amount overdrawn on the latter account, they were held entitled to set off their claim on the other account, which was in their favour (*q*).]

Principal and agent where action is by principal.

When a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal (*r*). But where the purchaser has notice, at

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(*l*) *Bottomley* v. *Brooke*, 1 T. R. 621; *Rudge* v. *Birch*, *ibid.* 622.

(*m*) *Isberg* v. *Bowden*, 8 Exch. 852.

(*n*) *Wake* v. *Tinkler*, 16 East, 36.

(*o*) *Tucker* v. *Tucker*, 4 B. & Ad. 745.

(*p*) *Bristowe* v. *Needham*, 7 M. & G. 648. [A set-off of judgments in cross actions was allowed where one of the parties had assigned his interest in the judgment in his favour, it appearing that the assignee was in fact the real plaintiff in the one action and the real defendant in the other; *Standeven* v. *Murgatroyd*, 27 L. J. Ex. 425.]

[(*q*) *Pedder* v. *The Mayor, &c., of Preston*, 12 C. B. N. S. 535; 31 L. J. C. P. 291. See, for other examples of setting-off banking accounts, *Bailey* v. *Finch*, L. R. 7 Q. B. 34; *Bailey* v. *Johnson*, L. R. 6 Ex. 279; 40 L. J. Ex. 189.]

(*r*) *Rabone* v. *Williams*, 7 T. R. 360, n.; *George* v. *Clagett*, *ibid.* 359.

the time of the sale, that the factor is acting as the agent of another, [though he does not know who that other is (*s*),] the case is different. He cannot set off a debt from the factor against an action by the principal, though perhaps payment to him might be good, even though made prematurely (*t*). In no case can such a set-off be allowed where the sale was made by a broker. He is in a different position from a factor: he is not trusted with the possession of the goods, and he ought not to sell them in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell them in his own name (*u*).

It is different, however, where the broker is acting under a *del credere* commission. In such a case, he is to be considered, as between himself and the vendee, as the sole owner of the goods (*x*). Therefore, where the defendant, a broker, acting under such a commission for A., sold his goods to B., for whom he had a commission to purchase, and, without any order to that effect from B., paid the price to A., and afterwards was directed by B. to resell the goods; it was held in an action brought by the assignees in bankruptcy of B. for the proceeds, that he might set off the money he had so paid to A. (*y*).

When action is by agent.

Where an auctioneer sold goods the property of A., and stated in the catalogue to be so, a plea that he was suing in trust for A., and that the defendant had a set-off against A., was admitted without objection as an answer to an action by him (*z*), though it would have been otherwise if he had a lien upon the goods for his charges, and had not parted with them except on an express agreement that the payment should be made to himself (*a*). This distinction, however, seems to have been denied in a late case. The plaintiff sued on a charter party, to which defendant pleaded that plaintiff entered into it

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[(*s*) *Semenza* v. *Brinsley*, 18 C. B. N. S. 467; 34 L. J. C. P. 161.]

(*t*) *Fish* v. *Kempton*, 7 C. B. 687. See *Warner* v. *M'Kay*, 1 M. & W. 591. [Where the goods are bought through an agent, notice to him is notice to his principal, however the notice may have been acquired; *Dresser* v. *Norwood*, 17 C. B. N. S. 466; 34 L. J. C. P. 48, Ex. Ch.; overruling S. C. 14 C. B. N. S. 574; 32 L. J. C. P. 201.]

(*u*) *Baring* v. *Corrie*, 2 B. & A. 137; recognised 7 C. B. 693.

(*x*) *Houghton* v. *Matthews*, 3 B. & P. 489.

(*y*) *Morris* v. *Cleasby*, 1 M. & S. 576.

(*z*) *Coppin* v. *Craig*, 7 Taunt. 243. See *Coppin* v. *Walker*, *ibid.* 237.

(*a*) *Jarvis* v. *Chapple*, 2 Chit. Rep. 387.

as master of the ship, and agent for the owner, and that he never had any beneficial interest in the charter party, nor any lien upon the freight, and that he was suing as agent and trustee for the owner, against whom defendant had a set-off (*b*). The plea was held bad on demurrer, and the authority of the above cases in support of the alleged doctrine was doubted (*c*).

Companies.

[Suits between Incorporated Companies and their members, or non-members, are subject to the ordinary rules of set-off; but when Companies are being wound up by or under the supervision of the Court, the right of set-off of contributories is regulated by 25 & 26 Vict. c. 89, ss. 38, 101 (*d*).]

Mutual credit in bankruptcy.

Set-off in bankruptcy [was till recently] regulated by stat. 12 & 13 Vict. c. 106, s. 171, which [enacted] that where there [had] been mutual credit given by the bankrupt and any other person, or where there [were] mutual debts between the bankrupt and any other person, the Court [should] state the account between them; and one debt or demand [might] be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by him; and what [should] appear due on either side, on the balance of such account, and no more, [should] be claimed or paid on either side respectively; and every debt or demand thereby made provable against the estate of the bankrupt, [might] also be set-off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy committed (*e*).

(*b*) *Isberg* v. *Bowden*, 8 Exch. 852; but see *Holmes* v. *Tutton*, 24 L. J. Q. B. 346.

(*c*) See as to set-off in actions by and against policy brokers, 3 Chitt. Stat. 1029. [Vol. 4, p. 172, 3rd ed.]

[(*d*) Under these sections a debt due from a limited company cannot, in the event of the company's being wound up under the supervision of the court, be set off against calls; *Grissell's case*, L. R. 1 Ch. 523; 35 L. J. Ch. 752; nor against debts incurred by the defendant to the company while in liquidation; *Sankey Brook Coal Co. Lim.* v. *Marsh*, L. R. 6 Ex. 185; 40 L. J. Ex. 125; but if the company is being voluntarily wound up, these sections do not apply, and a debt may be set off against calls; *Brighton Arcade Co.* v. *Dowling*, L. R. 3 C. P. 175; 37 L. J. C. P. 125. See as to their application in case of the bankruptcy of a contributory, *Re Duckworth*, L. R. 2 Ch. 578; 36 L. J. Bank. 28.]

[(*e*) Corresponding sections were contained in previous Acts, from 6 Geo. IV. c. 16].

[It is now regulated by the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, s. 39, which is as follows:—"Where there have "been mutual credits, mutual debts, or other mutual dealings "between the bankrupt and any other person proving or "claiming to prove a debt under his bankruptcy, an account "shall be taken of what is due from the one party to the other "in respect of such mutual dealings, and the sum due from "the one party shall be set-off against any sum due from the "other party; and the balance of such account, and no more, "shall be claimed or paid on either side respectively; but a "person shall not be entitled under this section to claim the "benefit of any set-off against the property of a bankrupt in "any case where he had at the time of giving credit to the "bankrupt notice of an act of bankruptcy committed by such "bankrupt, and available against him for adjudication."]

It will be at once perceived that there are some important differences between [these statutes] and those which we have just considered. The introduction of the words "mutual credit," [or "mutual credits,"] is one of the most remarkable.

Meaning of mutual credit.

It was early decided that mutual credit meant something more extensive than mutual debt (*f*), and it was finally settled, "that mutual credits, within the meaning of the bankrupt law, are credits which must, in their nature, terminate in debts" (*g*). That is, credits which have a natural tendency to terminate in claims not differing in nature from a debt (*h*).

What is a credit.

An accommodation acceptance is a credit given by the acceptor to the party accommodated (*i*); and so is an accommodation endorsement, which the endorser has been obliged to take up, even after bankruptcy (*k*). But although an agreement to accept a bill creates a credit, since the acceptance is itself a debt (*l*), an agreement to endorse a bill does not, since it merely constitutes a suretyship (*m*). It has also been laid down that, whoever takes a bill, must be considered as giving

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(*f*) *Ex parte Prescot*, 1 Atk. 230.
(*g*) *Rose* v. *Hart*, 8 Taunt. 499.
(*h*) 2 Sm. L. C. 276, 6th ed.
(*i*) *Smith* v. *Hodson*, 4 T. R. 211; *Russell* v. *Bell*, 8 M. & W. 277; *Bittleston* v. *Timmis*, 1 C. B. 389.
(*k*) *Hulme* v. *Muggleston*, 3 M. & W. 30.
(*l*) *Gibson* v. *Bell*, 1 Bingh. N. C. 743.
(*m*) *Rose* v. *Sims*, 1 B. & Ad. 521.

credit to the acceptor, and whoever takes a note, credit to the drawer (*n*).

Any agreement by which goods are to be dealt with by one party for the benefit of another, will also create a credit. Therefore, where the bankrupt entrusted the defendant, who was his creditor, with a string of pearls to be sold by defendant, and the profits to be paid to himself, and the defendant sold the pearls after bankruptcy, it was held that he might set-off his debt against an action by the assignees for the proceeds (*o*). In another case, the bankrupt who was about to make a shipment, in which he wished his own name not to appear, represented to the merchants through whom the shipment was to be effected, that the goods were the defendant's; and induced the defendant to write to them to insure, and make advances on the goods, which was done. It was held that this was such a credit reposed in the defendant, as enabled him, when he had got the proceeds of the goods, to set-off a debt due from the bankrupt to him. Bayley, J., said that it amounted to a consent by the bankrupt that the defendant should be considered the owner of the goods, and that the money produced by the consignment should pass through his hands. In that case he would have a right to deduct from it the debt due to him (*p*). [In a very recent case, running bills were delivered to bankers for collection, the proceeds to be transmitted to the depositors. It was held that this was a giving of credit to the bankers (*q*).]

Unliquidated damages not a credit.

The rule that a set-off cannot be pleaded to an action for unliquidated damages [was held to apply] equally to mutual credits. Therefore such a plea was held bad, in answer to a declaration by the assignees for neglecting to apply a sum of money, received by the defendant from the bankrupt, for the

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(*n*) *Per* Bayley, J., *Collins* v. *Jones*, 10 B. & C. 777, 782. [It is not necessary to constitute mutual credit that the parties both intended that there should be mutual credit; therefore it is sufficient, though the bill or note be taken by indorsement from a third party without the knowledge of the acceptor or maker. Byles on Bills, p. 367, 10th ed.]

(*o*) *French* v. *Fenn*, Cooke, B. L., 8th ed. 565.

(*p*) *Easum* v. *Cato*, 5 B. & A. 861; see *Young* v. *Bank of Bengal*, 1 Moo. P. C. 150; explained *Alsager* v. *Currie*, 12 M. & W. 751, 757.

[(*q*) *Naoroji* v. *Chartered Bank of India*, L. R. 3 C. P. 444; 37 L. J. C. P. 224; see further, *Astley* v. *Gurney*, L. R. 4 C. P. 714; 38 L. J. C. P. 357, in Ex. Ch.]

purpose of meeting an acceptance (*r*). But where the action was for breach of agreement to accept a bill in payment of goods, it was decided that the mutual credit clause might be taken advantage of (*s*). The Court pointed out that though the declaration professed to be for unliquidated damages, the measure of damage was necessarily a mere matter of calculation, viz., the amount of the bill, together with interest upon it, if the time of payment was passed; and that whether the bill was given or not, the transaction must necessarily end in a debt. And Patteson, J., distinguished it from an action for misapplying bills or money, because where such are sent for a specific purpose, the receiver cannot, by applying them to his own needs, alter the purpose and make the trust a debt (*t*).

[It would seem that this rule must now be restricted to those cases of unliquidated damages which are, by the Bankruptcy Act, 1869, excepted from the category of provable debts (*u*).]

Must be due in same right.

The debts to be set off against each other must also be due in the same right; therefore to an action for money had and received to the use of the assignee, a set-off of money due from the bankrupt is bad (*v*). But it is otherwise where both debts accrued due after the act of bankruptcy (*x*); or where the plea, while confessing that the money was received to the use of the assignees, shows that their title to it arose out of a credit given by the bankrupt; for then it appears that both debts were respectively due to and from the estate (*y*). [Where one of several joint debtors becomes bankrupt, the provisions of the statute have been held not to apply (*z*).]

A mere trustee cannot set off.

There is a difference between this statute and the former

(*r*) *Bell* v. *Carey*, 8 C. B. 887; and *per* Parke, J., *Thorpe* v. *Thorpe*, 3 B. & Ad. 584.

(*s*) *Gibson* v. *Bell*, 1 Bingh. N. C. 743; *Groom* v. *West*, 8 A. & E. 758.

(*t*) 8 A. & E. 772; see for such a case, *Buchanan* v. *Findlay*, 9 B. & C. 738.

[(*u*) See s. 31, *post*, p. 92.]

(*v*) *Groom* v. *Mealey*, 2 Bingh. N. C. 138; *Wood* v. *Smith*, 4 M. & W. 525; *Yates* v. *Sherrington*, 11 M. & W. 42; *Graham* v. *Allsopp*, 3 Exch. 186.

(*x*) *Kinder* v. *Butterworth*, 6 B. & C. 42.

(*y*) *Bittleston* v. *Timmis*, 1 C. B. 389, 399, 400.

[(*z*) *New Quebrada Co. Limited* v. *Carr*, L. R. 4 C. P. 651; 38 L. J. C. P. 283; decided upon 12 & 13 Vict. c. 106, s. 171.]

ones (*a*) as to the degree of interest which must be had in the debt from the bankrupt. The statutes of set-off are intended to prevent cross-actions. If the debts are legal debts, due to each in his own right, it is sufficient, though the plaintiff or defendant may claim their respective debts as a trustee for a third person. But under the bankrupt Acts, the mutual credit clause has not been so construed. The object of this clause is not to avoid cross-actions, but to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate. It does not authorize a set-off where the debt, though legally due from the bankrupt to the debtor, was really due to him as trustee for another; and though recoverable in a cross-action, would not have been recovered for his own benefit (*b*). Therefore, a defendant was not allowed to set-off the amount of a bill, in which he had no interest, but which he had obtained in order to claim credit for the amount against a debt owed by himself to the bankrupt acceptor (*c*). Nor the amount of the bankrupt's notes, which the defendant, a banker, had received *bonâ fide* from his customers, but on condition that he was only to credit them with the amount which was paid in respect of them by the assignees; because he could gain nothing in any event by the notes, but all the money received upon them would be received to the use of the person who transferred them (*d*). [But a broker insuring in his own name on behalf of an undisclosed principal, for whom he acts on a *del credere* commission, guaranteeing the solvency of the underwriter, has been considered to have a real interest in the contract sufficient to entitle him to set-off a loss against a claim of the assignees of a bankrupt underwriter for unpaid premiums (*e*).]

Credit must exist at time of bankruptcy.

Although, as we have seen, it is not necessary that there should be an actual debt between the parties at the time of bankruptcy, since possession of a bill not then due will be sufficient (*f*), the statute does not apply unless the mutual

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[(*a*) *i. e.*, the statutes of set-off.]

(*b*) *Per* Cur., *Forster* v. *Wilson*, 12 M. & W. 191, 203.

(*c*) *Fair* v. *M'Iver*, 16 East, 130; *Belcher* v. *Lloyd*, 10 Bingh. 310; *Lackington* v. *Combes*, 6 Bingh. N. C. 71.

(*d*) *Forster* v. *Wilson*, *ubi sub.*

[(*e*) *Lee* v. *Bullen*, 8 E. & B. 692 (*a*); 27 L. J. Q. B. 161.]

(*f*) *Alsager* v. *Currie*, 12 M. & W. 751.

credit existed at that time. Therefore, where plaintiff and defendant were jointly entitled to the benefits of a charter party, and the plaintiff assigned his interest to a third party, giving notice of the assignment to the defendant, and afterwards became bankrupt, it was decided that the assignment had put an end to the credit, and therefore that it could not be the ground of a set-off. But a mere nominal assignment of a debt, before the bankruptcy of one of the parties to a mutual credit, would not alter it (*g*).

A further difference between this section of the Bankruptcy Act, 1869, and the statutes of set-off, arises out of the provision which, [instead of restricting the set-off to debts in the strict legal sense of the word, directs in wide terms, that where there have been mutual credits, mutual debts or other mutual dealings between the bankrupt and any other person "proving or claiming to prove a debt under his bankruptcy," an account shall be taken, and the balance paid. By section 4 of the same Act (*h*), "debt provable in bankruptcy," includes any "debt or liability" by that Act made provable in bankruptcy; and by s. 31, with the exception of demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise, and of debts or liabilities, the value of which the Court may pronounce to be incapable of being fairly estimated, all "debts and liabilities, present or future, certain or contingent," are to be deemed to be debts provable in bankruptcy; and the definition of the word liability is, that it shall for the purposes of the Act "include any compensation for work or labour done, any obligation or possibility of an obligation to pay money, or money's worth, on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the close of the bankruptcy; and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more con-

(*g*) *Boyd* v. *Mangles*, 16 M. & W. 337, 344.
[(*h*) 32 & 33 Vict. c. 71.]

tingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." The repealed Act which made all debts and demands which were provable against the estate of the bankrupt the subject of set-off, contained clauses providing for the proof of debts payable upon a contingency and liabilities to pay upon a contingency, upon the construction of which there were numerous judicial decisions; but the extensive words of the new Act seem to have been expressly intended to include cases which were held not to come within those clauses, and, therefore, those decisions no longer require notice here (*i*).]

Finally, we must notice the right which may arise in some cases to an equitable set-off, under the provisions of 17 & 18 Vict. c. 125, s. 83.

Equitable set-off.

Equity will sometimes give relief where the party sued has a counter-claim which cannot be set-off at law (*j*). Accordingly a plaintiff at law has been restrained from taking out execution on a judgment, where the defendant had a judgment against him to a greater amount, which the Court of King's Bench refused to allow him to set-off. The Vice-Chancellor said that the lesser judgment was, in point of fact, satisfied (*k*).

Must impeach title to legal demand.

This case, however, seems to have been treated as rather transcending the limits within which equity gives relief. Lord Cottenham says, "This equitable set-off exists in cases where the party seeking for the benefit of it can show some equitable ground for being protected against his adversary's demands. The mere existence of cross-demands is not sufficient, although

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[(*i*) They will be found, if required, in pp. 58—60, 1st ed.]

[(*j*) The counter-claim must be in respect of an ascertained sum; see Kerr on Injunctions, c. 4, s. 5, p. 66; 1 Joyce on Injunctions, 489. Where there is a clear natural connexion between claim and counter-claim, and both originate in one transaction, a Court of Equity will sometimes interfere to prevent the one party from enforcing his claim without allowing the claim of the other, even though it be unliquidated, *ibid.* 67, and see cases cited there. A right to set-off has been held not to exist where the cross-claims were for freight and damage to cargo; *Stimson* v. *Hall*, 1 H. & N. 831; 26 L. J. Ex. 212; for non-repair under a demise and re-demise, *Minshull* v. *Oakes*, 2 H. & N. 793; 27 L. J. Ex. 194; for money lent and damage from negligent sale of securities, *Atterbury* v. *Jarvie*, 2 H. & N. 114; 26 L. J. Ex. 178; for a judgment in an action for excessive distress and cross claim for rent and dilapidations, *Maw* v. *Ulyatt*, 31 L. J. Ch. 33. See further, *Throckmorton* v. *Crowley*, L. R. 3 Eq. 196; and as to set-off of debts against legacies, *Bousfield* v. *Lawford*, 1 De G. J. & S. 459; *Stammers* v. *Elliott*, L. R. 3 Ch. 195; 37 L. J. Ch. 353.]

(*k*) *Williams* v. *Davies*, 2 Sim. 461.

it is difficult to find any other ground for the order in *Williams* v. *Davies* as reported. In all the cases upon the subject, except *Williams* v. *Davies*, it will be found that the equity of the bill impeached the title to the legal demand" (*l*).

Where one demand is equitable.

Where there are cross-demands of such a character that, if both were recoverable at law, they would be the subject of legal set-off, then, if either of the claims is of an equitable nature, equity will enforce the set-off (*m*). But it seems undecided whether the mere fact that the defendant is the assignee of a legal debt, arising between the plaintiff and a third party, will entitle him in equity to the benefit of such a set-off. The decision in *Williams* v. *Davies* goes much further than such a case would require (*n*).

Assignee.

[The assignee of a debt takes it, subject to the debtor's right to set off debts which accrue due to him from the assignor before he has notice of the assignment (*o*), but not, in the absence of special circumstances showing a connection between the transactions out of which the cross-claims arise, debts which accrue due after such notice, even though resulting from a contract entered into previously (*p*). It is now settled that in an action at law by proper equitable plea, a defendant may set off against the plaintiff's claim, a debt due from the plaintiff to a trustee for the defendant (*q*), or may allege that the plaintiff is suing as trustee for a third person, and set off a debt due to the defendant from such third person (*r*).]

Admissible in action for unliquidated damages.

When the equitable set-off is, *per se*, proper to be allowed, it is no objection that the action against which it is set up is one of tort or for unliquidated damages, in which no set-off is

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(*l*) *Rawson* v. *Samuel*, Cr. & Ph. 178, 179, where all the cases are considered.

(*m*) *Clark* v. *Cort*, Cr. & Ph. 154.

(*n*) *Per* Lord Cottenham, *Clark* v. *Cort*, *ubi sup.*

[(*o*) *Cavendish* v. *Geaves*, 24 Beav. 163; 27 L. J. Ch. 314; *Wilson* v. *Gabriel*, 4 B. & S. 243. But the debtors may, by their original contract with the plaintiff, or by their subsequent dealings with the assignees, deprive themselves of the right of set-off; *Higgs* v. *Assam Tea Co. Limited*, L. R. 4 Ex. 387; 38 L. J. Ex. 233; *Dickson* v. *Swansea Vale Ry. Co.*, L. R. 4 Q. B. 44; 38 L. J. Q. B. 17.]

[(*p*) *Watson* v. *Mid-Wales Ry. Co.*, L. R. 2 C. P. 593; 36 L. J. C. P. 285; *Jeffryes* v. *Agra and Masterman's Bank*, L. R. 2 Eq. 674; 35 L. J. Ch. 686.]

[(*q*) *Cochrane* v. *Green*, 9 C. B. N. S. 448; 30 L. J. C. P. 97.]

[(*r*) *Agra and Masterman's Bank* v. *Leighton*, L. R. 2 Ex. 56; 36 L. J. Ex. 33.]

admissible at law (*s*). Set-off has been enforced in equity where the claim was of an equitable nature, not amounting to a mutual credit under the statute then in force (*t*). It was also allowed where the action was by a shipowner against each of several consignees for freight, while their claim against him arose out of an injury to the cargo, the loss falling upon each of them being unascertained, and therefore incapable of being the subject of legal set-off (*u*).

Exceptions to rule that debts must be mutual.

The rule that debts to be set off must arise in the same right, prevails in equity as well as law (*x*). But where an administrator and sole next of kin sued on a bond given to his intestate, and it appeared, from the state of the property, that he was in fact suing for his own benefit, a set-off of a debt due from him in his own right was allowed (*y*). And *vice versâ*, where an agent sues for the price of goods sold by him for his principal, it would, if not a legal, be at all events a good equitable defence, that his lien was satisfied, and that the defendant had a set-off against the principal (*z*).

Joint debt set-off against separate debt.

At law, too, a joint debt cannot be set off against a separate debt; but where it is clearly proved that the joint debt arises out of the same series of transactions as those which produced the separate debt, it seems it may in equity. For instance, where in dealings between a customer and a bank, the joint debt to the bank arose out of a joint promissory note given by the father, and the son as his surety, for advances; and the separate debt from the bank arose out of a deposit of stock, made by the father as security for the same series of loans, Lord Eldon appeared to think that equity would allow a set-off (*a*). On the same principle, where the joint debt is a bond by principal and surety, a separate debt due to the principal

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(*s*) *Cawdor* v. *Lewis*, 1 Y. & C. 427.

(*t*) *James* v. *Kynnier*, 5 Ves. 108.

(*u*) *Jones* v. *Moore*, 4 Y. & C. 351. [The cross-claim in this case was for the proceeds of the sale of oil which had leaked from the casks of the different consignees, and had been sold by the captain in one mass. It was not a claim for damages against the captain, as in *Stimson* v. *Hall*, *ante*, p. 93, note (*j*).]

(*x*) *Gale* v. *Luttrell*, 1 Y. & J. 180; *Lambarde* v. *Older*, 17 Beav. 542.

(*y*) *Jones* v. *Mossop*, 3 Hare, 568.

(*z*) *Holmes* v. *Tutton*, 24 L. J. Q. B. 346; and see *Farebrother* v. *Welchman*, 3 Drew. 122; 24 L. J. Ch. 410.

(*a*) *Vulliamy* v. *Noble*, 3 Mer. 593, 618.

may be set off in equity, because the joint debt is nothing more than a security for the separate debt; and upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account, for which the other was a security (*b*). And so where A. & B., partners, gave a joint and several bond to C., and C. became indebted to A., and B. became bankrupt; C. proved the bond under the commission, and then brought a joint action upon it against A. & B., to which of course A. could not plead his set-off: it was held that C., by proving under the commission, had elected to proceed severally upon his bond, and an injunction was issued against the joint action (*c*).

Pleas in avoidance of circuity of action.

Something analogous to the statutory right of set-off, is the power which has always existed at common law, of setting off one right of suit against another, for the sake of avoiding circuity of action. This exists even where the right which is pleaded in bar is a right to sue for unliquidated damages. It is absolutely necessary, however, that the damages recoverable in each action should be strictly identical, and should appear upon the record to be so (*d*).

As to payments made by a tenant, which he may deduct from his rent, see *post*, p. 188.

(*b*) *Ex parte* Hanson, 12 Ves. 346; 18 Ves. 232, S. C.: and see *Ex parte* Stephens, 11 Ves. 24.

(*c*) *Bradley* v. *Millar*, 1 Rose, 273.

(*d*) See the cases collected, 2 Wms. Saund. 150; *Ford* v. *Beech*, 11 Q. B. 852; *Belshaw* v. *Bush*, 11 C. B. 191; *Charles* v. *Altin*, 15 C. B. 46; 23 L. J. C. P. 197; *Thompson* v. *Gillespy*, 24 L. J. Q. B. 340; [*Alston* v. *Herring*, 11 Ex. 822; 25 L. J. Ex. 177; *Minshull* v. *Oakes*, 2 H. & N. 793; 27 L. J. Ex. 194; *Schloss* v. *Heriot*, 14 C. B. N. S. 59; 32 L. J. C. P. 211.]

CHAPTER III.

1. *Damages Limited by Amount laid.* | 2. *Liquidated Damages and Penalty.*

BEFORE proceeding to discuss the rules of law, by which damages are limited in the various forms of action, it will be necessary to point out two cases in which they are limited by the acts of the parties themselves.

Damages cannot exceed amount laid.

The first case involves no difficulty. It arises out of the rule, that the plaintiff cannot recover greater damages than he has claimed in his declaration (*a*). It is said indeed by Lord Coke (*b*), that in some cases the plaintiff might have judgment for more damages than he has counted for; and this dictum was relied on by Lee, C. J., in *Ray* v. *Lister* (*c*). It has been pointed out, however, by Lord Ellenborough, that the mistake arose from a misconception of an old case in the Year Books (*d*). "It by no means establishes that the plaintiff may have more damages against the defendant than what he has counted for against him, but that having counted in detinue against the defendant for damages to a certain amount, he may recover against the garnishee, (against whom he has alleged no particular amount of damages) a greater sum than he has laid as his damages against the defendant" (*e*).

Nor amount liquidated by previous agreement.

The second case presents much greater difficulty. It is that in which the parties to a contract, by previous agreement, fix

(*a*) *Cheveley* v. *Morrison*, 2 W. Bl. 1300; *Watkins* v. *Morgan*, 6 C. & P. 661. As to the consequences of greater damages being given, see *post*, p. 440.
(*b*) 10 Rep. 117 b.
(*c*) Andr. 384.
(*d*) 8 Hen. VI. 5, a.
(*e*) 4 M. & S. 99; 1 Roll. Abr. 578.

the damages for its breach at a particular sum. Here the question at once arises, whether the sum so fixed ought to be regarded as a penalty, or as liquidated damages.

Distinctions between penalty and liquidated damages.

This distinction is a most important one, because where the sum consists of the liquidated damages for breach of the agreement, fixed and agreed upon between the parties, that very sum is the ascertained damage, and the jury are confined to it (*f*). And if a verdict is given for a smaller sum, a new trial will be granted (*g*). And of course equally so if the verdict were for a larger sum. On the contrary, where the sum is treated as a penalty, either more or less than the amount stated may be recovered.

Necessary to sue in form for liquidated damages, as such.

Upon both of these points, however, there are some further niceties to be observed. And first as to cases where the damages are liquidated; although the plaintiff is entitled to the exact sum, and can in no case recover more, it seems he may recover less, unless he sues in form for the precise amount. Therefore where the defendant covenanted not to lop any trees without the consent of the plaintiff, under a penalty of 20*l.* for each tree over and above the actual value of the tree, and the plaintiff sued for breach of the covenant not to lop, without alleging non-payment of the 20*l.*; it was held, that the covenant (even assuming the damage to be liquidated) was alternative, not to lop, or, if he did, to pay liquidated damages. "If then the plaintiff is seeking to recover liquidated damages, he should have alleged, that though the defendants lopped the trees, they did not pay the stipulated amount; otherwise it does not follow that they have broken their covenant. We must assume from this breach, that the plaintiff is seeking to recover an unliquidated amount, in which case the jury are at liberty to give such damages as they think he has sustained" (*h*).

Where there is a penalty, plaintiff may recover less or more than the amount.

In the next place as to a penalty, there is a distinction according to the mode in which the plaintiff sues, which may be well stated in the words of Lord Mansfield: "There is a

(*f*) *Lowe* v. *Peers*, 4 Burr. 2229; *Crisdee* v. *Bolton*, 3 C. & P. 442, overruling *Randall* v. *Everest*, 2 C. & P. 577.

(*g*) *Farrant* v. *Olmius*, 3 B. & A. 692.

(*h*) *Hurst* v. *Hurst*, 4 Exch. 571; 19 L. J. Ex. 413. [See as to this case, *Leigh* v. *Lillie*, 6 H. & N. 165; 30 L. J. Ex. 25.]

difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election. He may either bring an action of debt for the penalty, and recover it (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole), or if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty, *toties quoties*" (*i*). When the plaintiff sues in form for the penalty, the jury cannot go beyond it: but within it they may give him any compensation which he can prove himself entitled to (*j*). On the other hand, where a charter party was secured by a penalty, it was ruled that upon breach the plaintiff had his choice, either to receive the penalty, and rescind the contract, or to bring an action upon the contract, and let the covenant stand, and so obtain greater damages than the penalty (*k*); though it would have been otherwise if the agreement had been for liquidated damages (*l*).

Same rules in equity.

The same distinction between a penalty and liquidated damages prevails in equity. "It will relieve against a penalty upon a compensation; but where the covenant is 'to pay a particular liquidated sum,' a Court of Equity cannot make a new covenant for a man; nor is there any room for compensation or relief. The specified sum is found in damages; it is a particular liquidated sum, fixed and agreed on between the parties, and it is therefore the proper quantum of damage" (*m*).

Usury laws.

Damages [could] not be fixed at a liquidated sum in order to evade the usury laws (*n*).

Penalty, or liquidated damages, is a question of law.

The question, whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty, or as liquidated and ascertained damages, is a question of law to be decided by the judge, upon a consideration of the whole in-

(*i*) *Lowe* v. *Peers*, 4 Burr. 2228.
(*j*) *Wilbeam* v. *Ashton*, 1 Camp. 78.
(*k*) *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East, 433; *Maylam* v. *Norris*, 2 D. & L. 829.
(*l*) 13 East, 345.
(*m*) *Per* Ld. Mansfield, *Lowe* v. *Peers*, *ubi sup.*
(*n*) *Orr* v. *Churchill*, 1 H. Bl. 232; [17 & 18 Vict. c. 90 repealed the Usury Laws].

strument (*o*). The following appear to be the principles by which their decision is governed (*p*).

A sum stated to be a penalty is primâ facie so.

1. Where the sum is expressly stated to be a penalty, and there are no other words altering, controlling, or affecting this statement, the sum cannot be considered as liquidated damages (*q*). But where the agreement was, "In consideration that A., of M., surgeon, will engage me the undersigned B. as assistant to him as surgeon, I, the said B., promise the said A., that I will not at any time practise as surgeon at M., or within seven miles thereof, under a penalty of 500*l.*," this was held to be liquidated damages. Coltman, J., said, "Although the word 'penalty,' which would *primâ facie*, exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement and the surrounding circumstances, to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Considering the nature of this agreement, and the difficulty the plaintiff would be under in showing what specific damage he had sustained from the defendant's breach of it, I think we can only reasonably construe it to be a contract for stipulated and ascertained damages" (*r*).

So where smaller sum is secured by agreement for a greater one.

2. Where the payment of a smaller sum is secured by a larger, the sum agreed for must always be considered as a penalty (*s*). And, therefore, where a contract to do, or abstain from something, is secured by an agreement to pay a fixed sum, and upon the face of the same instrument a certain damage less than that sum is made payable, in case of a breach of contract, that sum shall be construed to be a penalty (*t*).

(*o*) *Sainter* v. *Ferguson*, 7 C. B. 727.

[(*p*) It must be remembered that the real intention of the parties is to be collected from the language which they have used, and that the rules which have been laid down are only to assist in ascertaining that intention; *Dimech* v. *Corlett*,, 12 Moore, P. C. at p. 229; *Reynolds* v. *Bridge*, 6 E. & B. 528; 26 L. J. Q. B. 12.]

(*q*) *Smith* v. *Dickenson*, 3 B. & P. 630; *Sloman* v. *Walter*, 1 Bro. C. C. 418.

(*r*) *Sainter* v. *Ferguson*, 7 C. B. 716, 728. And see *Leighton* v. *Wales*, 3 M. & W. 545. [On a guarantee that a vessel in which the plaintiff had shipped goods, should sail before any other vessel then in berth, "under penalty of forfeiting one half of the freight," it was held that one half of the freight could be recovered as liquidated damages, without evidence of actual damage; *Sparrow* v. *Paris*, 7 H. & N. 594; 31 L. J. Ex. 137.]

(*s*) *Per* Chambre, J., *Astley* v. *Weldon*, 2 B. & P. 354.

(*t*) *Per* Ld. Eldon, *ibid.* 350.

The facts in reference to which the above rules were stated were as follows. There were mutual agreements between the manager of a theatre and an actress, that he should pay her a certain weekly salary and travelling expenses, and that she should perform at his theatre, and comply with all its rules, and be subject to and pay all fines; and that either of them neglecting to perform that agreement should pay to the other 200*l.* The action was for a refusal to perform. It was held that the 200*l.* was a penalty, otherwise a refusal to pay a trifling fine, or to do something which by the rules of the theatre was punishable by a fine, would have entailed the entire liability.

[But if the larger sum is actually due and the creditor agrees to take a lesser sum, provided that sum is secured in a certain way and paid on a certain day, and that if those stipulations be not performed, he shall be entitled to recover the whole of the original debt, such remitter to his original right does not constitute a penalty, and a Court of Equity will not interfere to prevent it (*u*).]

Where there are several things to be done.

3. It has been laid down broadly, "that where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered a penalty" (*x*). This, however, must be limited to cases where it is apparent that the parties could not have intended the entire sum to be the ascertained damages for any breach. "Where the sum which is to be a security for the non-performance of an agreement to do several acts, will, in case of breaches of the agreement, be in some instances too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be

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[(*u*) *Thompson* v. *Hudson*, L. R. 4 H. L. 1; 38 L. J. Ch. 431. This was decided in the House of Lords in opposition to the Master of the Rolls and the Lords Justices. Lord Westbury said, that any plain man walking the streets of London would have said that it was in accordance with common sense, and if he were told that it would be requisite to go to three tribunals before getting it accepted, would have held up his hands with astonishment at the state of the law. In *Lord Ashtown* v. *White*, 11 Ir. L. R. 400, where a demise of land at a yearly rent of 187*l.*, with usual clauses for distress and entry on non-payment, contained an agreement that so long as the lessee performed the covenant, the lessor would be content with the yearly rent of 93*l.*, payable on the same days as the first reserved rent, it was held that the larger rent was not a penal rent, and that ejectment could be maintained on its non-payment.]

(*x*) *Per* Heath, J., 2 B. & P. 353.

considered as a penalty" (*y*). This view of an agreement is invariably taken where some of the breaches relate to pecuniary payments, which are in their nature ascertained.

Kemble v. *Farren.*

The leading case upon this part of the subject is that of *Kemble* v. *Farren* (*z*). There the defendant had engaged to act as principal comedian at Covent Garden for four seasons, conforming in all things to the rules of the theatre. The plaintiff was to pay him 3*l.* 6*s.* 8*d.* every night the theatre was open, with other terms. The agreement contained a clause that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, &c., should amount; and which sum was thereby declared by the said parties *to be liquidated and ascertained damages, and not a penalty, or penal sum, or in the nature thereof.* Notwithstanding these sweeping words, the Court decided that the sum must be taken to be a penalty, as it was not limited to those breaches which were of an uncertain nature and amount. And Tindal, C. J., said, "that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty, appears to be a contradiction in terms; the case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have in modern times endeavoured to relieve, by directing juries to assess the real damages sustained by breach of the agreement" (*a*). And the same decision was arrived at where the agreement was that the defendant should grant a lease, and the plaintiff

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(*y*) *Per* Bayley, J., *Davies* v. *Penton*, 6 B. & C. 223; affirmed *Horner* v. *Flintoff*, 9 M. & W. 681; [*Dimech* v. *Corlett*, 12 Moo. P. C. 229; *Reindel* v. *Schell*, 4 C. B. N. S. 97; 27 L. J. C. P. 146; *Betts* v. *Burch*, 4 H. & N. 506; 28 L. J. Ex. 267, where see *per* Bramwell, B., as to the effect of 8 & 9 Will. III. c. 11, s. 8.]

(*z*) 6 Bingh. 141.

(*a*) 6 Bingh. 148. Such an agreement, however, might be made, for it is laid down by Parke, B., 1 Exch. 665, "that it would be competent for the parties to make a stipulation to pay a certain sum on the non-performance of a covenant to pay a smaller sum; but they must do so in express terms; and if that be done, I do not see how the courts can avoid giving effect to such a contract."

should execute a counterpart and pay the expenses; for the mutual performance of which contract the parties bound themselves in the penalty of 500*l.* to be recovered against the defaulter as liquidated damages (*b*).

On the other hand, if there be a contract consisting of one or more stipulations, the breach of which cannot be measured, then the contract must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty (*c*). And so it was held where a covenant for dissolution of partnership between attorneys contained an agreement, "that the said J. S. will not within the next seven years carry on the business of an attorney within fifty miles from E., nor interfere with, solicit, or influence the clients of the late copartnership, and if the said J. S. shall in any respect infringe the present covenant, he the said J. S. shall pay the sum of 1000*l.* as liquidated damages, and not by way of penalty" (*d*).

Where there is only one event.

4. There never was any doubt that if there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of

(*b*) *Boys* v. *Ancell*, 5 Bingh. N. C. 390; *Davies* v. *Penton*, 6 B. & C. 216; *Charrington* v. *Laing*, 6 Bingh. 242; *Beckham* v. *Drake*, 8 M. & W. 846.

(*c*) *Per* Parke, B., *Atkyns* v. *Kinnier*, 4 Exch. 776, 783. [So where a specified increased rent was to become payable on breach of any of the covenants in the lease; *Smith* v. *Ryan*, 9 Ir. L. R. 235.]

(*d*) *Galsworthy* v. *Strutt*, 1 Exch. 659; *Rawlinson* v. *Clarke*, 14 M. & W. 187. [So *Reynolds* v. *Bridge*, 6 E. & B. 528; 26 L. J. Q. B. 12. And where the form of the bond given upon the sale of a medical practice, was that if any of certain prohibited things were done, and the sum of 300*l.* paid, then the bond should be void; that sum was held recoverable upon an infraction of the agreement; *Mercer* v. *Irving*, E. B. & E. 563; 27 L. J. Q. B. 291. But it does not follow in every such case that a man may elect to break his engagement by paying for his violation of the contract. Therefore, where the condition of a bond given by a managing clerk to an attorney, after reciting an agreement that the clerk should give a bond not to practise within a specified distance, was that if he did so practise, and should pay the sum of 1000*l.*, the bond should be void, a Court of Equity, carrying out the real intention of the parties, granted an injunction to prevent him from practising; *Howard* v. *Woodward*, 34 L. J. Ch. 47. But of course this was upon the plaintiff's undertaking not to sue upon the bond. A man cannot have his liquidated damages and his writ of injunction also; *Carnes* v. *Nesbitt*, 7 H. & N. 158; 30 L. J. Ex. 348. In the ordinary case of payment of a deposit to be forfeited on the purchaser's failure to perform his contract, the vendor may retain it on such failure, though his damage be not so great; *Hinton* v. *Sparkes*, L. R. 3 C. P. 161; 37 L. J. C. P. 81].

compensation, in order to avoid the difficulty (*e*). And this, even though the contract be one of indemnity, as an insurance policy, and it can be proved that the plaintiff has not been damnified to the amount estimated (*f*).

Use of the words "liquidated damage" not conclusive.

5. The cases cited above (*g*) have overruled the doctrine laid down in *Reilly* v. *Jones* (*h*), that the mere use of the words "liquidated damages" is decisive against the sum being held to be a penalty. The principle is, that although the parties may have used the term "liquidated damages," yet if the Court can see upon the whole of the instrument taken together, that there was no intention that the entire sum should be paid absolutely on non-performance of any of the stipulations of the deed, they will reject the words and consider it as being in the nature of a penalty only (*i*).

In cases of doubt, inclination in favour of penalty.

6. Where it is doubtful from the terms of the contract, whether the parties meant that the sum should be a penalty or liquidated damages, the inclination of the Court will be to view it as a penalty (*k*). But the mere largeness of the amount fixed will not, *per se*, be sufficient reason for holding it to be so (*l*).

(*e*) *Per* Cresswell, J., *Sainter* v. *Ferguson*, 7 C. B. 730; *Fletcher* v. *Dyche*, 2 T. R. 32. [*Sparrow* v. *Paris*, 7 H. & N. 594; 31 L. J. Ex. 137. A stipulation for interest on purchase-money, at a rate increasing with the delay in payment, has been held not to be in the nature of a penalty to secure punctual payment; *Herbert* v. *Salisbury and Yeovil Ry. Co.*, L. R. 2 Eq. 221. But if mortgage interest is 4 per cent., with an agreement that if it is not paid punctually 5 per cent. shall be paid, that is in the nature of a penalty against which equity will relieve; *Ib.*, *per* Lord Romilly.]

(*f*) *Irving* v. *Manning*, 6 C. B. 391.

(*g*) *Ante*, p. 101.

(*h*) 1 Bingh. 302.

(*i*) *Per* Parke, B., *Green* v. *Price*, 13 M. & W. 701; affirmed, 16 M. & W. 346; *Cole* v. *Sims*, 23 L. J. Ch. 258. [The use of the expression "penalty," or "liquidated damages," signifies nothing, the real intention of the parties having to be ascertained. See *Sparrow* v. *Paris*, 7 H. & N. 594; 31 L. J. Ex. 137; *per* Bramwell, B., *Betts* v. *Burch*, 4 H. & N. at p. 510; 28 L. J. Ex. at p. 271; and *Dimech* v. *Corlett*, 12 Moo. P. C. 299.]

(*k*) *Barton* v. *Glover*, Holt, N. P. C. 43; *Crisdee* v. *Bolton*, 3 C. & P. 243.

(*l*) *Ibid.*, and *per* Lord Eldon, *Astley* v. *Weldon*, 2 B. & P. 351; [and *per* Lord Romilly, *Herbert* v. *Salisbury and Yeovil Ry. Co.*, L. R. 2 Eq. 221.]

CHAPTER IV.

INTEREST.

1. *At Common Law.*
2. *As Damages.*
3. *By Statute.*

THE next point of a preliminary nature which requires notice, is the right to recover interest. This right exists in a great number of actions, but I have thought it better, for the sake of clearness, to place the whole subject before the reader in a single view.

Interest is recoverable, either upon the original cause of action, or again upon the amount of the judgment. It may also arise either at common law, or by statute.

Interest at common law.

I. First, then, as to interest at common law upon the original cause of action.

It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade, or other circumstances (*a*).

On bills and notes.

1. As to the case of bills of exchange and promissory notes, this rule has never been doubted. Some distinctions, however, prevail as to the time from which interest is to be computed, and the rate at which it is to be calculated, where any part of the contract has been entered into abroad. This subject will be discussed at length, *post*, Chapter viii.

Express agreement.

2. Cases in which there has been an express agreement in words to allow interest, are, of course, quite clear. Where, however, A. and B., who had jointly and severally granted an annuity, mutually agreed each to pay one half of it, and

(*a*) *Per* Abbott, C. J., *Higgins* v. *Sargent*, 2 B. & C. 349.

to indemnify the other against all actions, suits, charges, damages, demands, sums of money and expenses, which either of them might incur through the default of the other in paying his just share; it was held that one who had paid more than his just share was not entitled at law to interest (as interest and not as damages) upon the surplus. The Court said, "The contract is to pay the money and damages; there is no express contract to pay interest, nor any course of dealing from which such a contract can be implied" (*b*).

Implied agreement.

3. Where parties have acquiesced in a course of dealing, in which interest was exacted, they will be assumed to have contracted to pay it (*c*); and in this way even compound interest may be charged, as long as the accounts remain open (*d*).

Compound interest.

But although compound interest may be charged, by means of half-yearly rests, where such a practice is assented to, it is not sufficient to show that such has been the usage of the plaintiff, without proving that the defendant was acquainted with it (*e*). And even in the case of merchants' accounts where this system prevails the plaintiff can recover no more than the principal upon the *last* balance, in which there is no new account, and no new transaction, however long it may be before the action is brought to recover the balance; and the jury cannot give interest, still less compound interest, upon the balance (*f*).

Where payment to be made by bill.

Again, where a party undertakes to pay a debt by means of a bill or note, which would, if given, bear interest, and fails to give the note, the debt will bear interest from the time the bill or note would have been due (*g*). But the contract to pay by bill must be clearly made out. Therefore, where the

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(*b*) *Bell* v. *Free*, 1 Swanst. 90.

(*c*) *Ex parte Williams*, 1 Rose, 399.

(*d*) *Bruce* v. *Hunter*, 3 Camp. 467; *Newell* v. *Jones*, 4 C. & P. 124; *Eaton* v. *Bell*, 5 B. & A. 34; *Fergusson* v. *Fyffe*, 8 Cl. & F. 121; [*Mosse* v. *Salt*, 32 Beav. 269; 32 L. J. Ch. 756].

(*e*) *Dawes* v. *Pinner*, 2 Camp. 486, n.; *Moore* v. *Voughton*, 1 Stark. 487. [And see *Williamson* v. *Williamson*, L. R. 7 Eq. 542, where acquiescence in a banker's charge of 500*l.* for a half year's commission on an overdrawn account, was held not to entitle the banker to make the same charge as of right in subsequent half years. Also *Crosskill* v. *Bower*, 32 Beav. 86; 32 L. J. Ch. 540.]

(*f*) *Attwood* v. *Taylor*, 1 M. & G. at p. 301; *Waring* v. *Cunliffe*, 1 Ves. 99; *Ex parte Bevan*, 9 Ves. 223; *Fergusson* v. *Fyffe*, 8 Cl. & F. 121.

(*g*) *Slack* v. *Lowell*, 3 Taunt. 157; *Marshall* v. *Poole*, 13 East, 98; *Farr* v. *Ward*, 3 M. & W. 25; *Rhoades* v. *Lord Selsey*, 2 Beav. 359.

defendant undertook to pay money according to instructions to be received from a third party, and the instructions given were to pay it in discharge of a bill given by that third party, and then in the plaintiff's hands, Held that this was not an undertaking to pay by a bill, on which interest would run, though interest would run on a direct guarantee for payment of a bill (*h*).

It is a question for the jury to say, whether the defendant had contracted to pay by bill or not, and slight evidence on this point has been held sufficient. Goods were sold to the defendant in January, and in April he wrote to the plaintiff saying, "The document you have sent me appears to be in the nature of a bill, and being payable to your order, is good in the market; just what I wished to avoid. The document I have wished to give you was simply my promissory note, payable to yourself." Nothing was proved to have been said at the time of the contract about payment, and no demand for interest had ever been made, but the plaintiff claimed interest in his particulars of demand. It was decided that this letter offered some evidence of an agreement to pay by a note, upon which the jury were warranted in giving interest (*i*).

The principle of these decisions of course is, that where a person promises to give a bill, which would bear interest, the law will imply an engagement, in case no bill is given, to pay interest as if it had been given (*k*). It seems to be on the same principle, that where a bond is given with a penalty in a larger amount, to secure payment of a sum of money, interest will be allowed even without an express stipulation. "The principal money due and the interest thereon may be considered as part of the penalty" (*l*). Because the object of the penalty is to secure him to whom it is given against all damage arising from default. Now one of the most obvious sources of damage is the loss of interest on the sum due (*m*). In one case (*n*) where interest was allowed in an

Bond with a penalty.

(*h*) *Hare* v. *Rickards*, 7 Bingh. 254.
(*i*) *Davis* v. *Smyth*, 8 M. & W. 399.
(*k*) 3 Taunt. 161.
(*l*) *Per* Bayley, J., *Cameron* v. *Smith*, 2 B. & A. 308.
(*m*) *Farquhar* v. *Morris*, 7 T. R. 124.
(*n*) *Hellier* v. *Franklin*, 1 Stark. 291.

action on a bond, it is not stated that there was any penalty as there was in the instance last cited; but as the case was decided by Lord Ellenborough, and clearly did not come within any of the rules laid down by himself four years previously (*o*), it may fairly be concluded that the bond was drawn in the ordinary form, so as to account for the decision. Where the defendants bound themselves to pay 1500*l.* in goods, by three equal payments, at three, five, and seven months; "in failure of which we acknowledge and hereby render ourselves liable to be sued and proceeded against *for the amount*;" it was held that the instrument did not carry interest, on the ground that it had not the effect of a bond; as there was no penalty, and the parties were bound only in the amount which was to be actually paid (*p*). And in *Hogan* v. *Page* (*q*), it was decided that a single bond did not carry interest.

Money payable on a fixed day.

Formerly it was thought, where a sum of money was agreed to be paid on a particular day, that on default interest from that day might be recovered without any express or implied contract to that effect (*r*). But this doctrine has now been overruled (*s*). It has, however, been always held that where, by an award, money is made payable on a certain day, interest ought to be allowed from that day, if payment was demanded at the place appointed (*t*). I cannot, on principle, explain this exception. Many apparent exceptions to the rule, that interest is only recoverable in the cases just mentioned, may be explained by distinguishing between interest recovered as part of the debt, and interest recovered as damages for its detention. For instance, interest on a deposit may be recovered, if laid as special damage in an action for breach of agreement to sell an estate (*u*). So it may be allowed as

Awards.

Interest recoverable as damages.

(*o*) *Calton* v. *Bragg*, 15 East, 223.
(*p*) *Foster* v. *Weston*, 6 Bingh. 709.
(*q*) 1 B. & P. 337.
(*r*) *Blaney* v. *Hendricks*, 2 W. Bl. 761; 3 Wils. 205, S. C.; *Shipley* v. *Hammond*, 5 Esp. 114; *Chalie* v. *Duke of York*, 6 Esp. 45; *De Havilland* v. *Bowerbank*, 1 Camp. 50; *Mountford* v. *Willes*, 2 B. & P. 337.
(*s*) *Gordon* v. *Swan*, 12 East, 419; *Higgins* v. *Sargent*, 2 B. & C. 348; *Page* v. *Newman*, 9 B. & C. 378; *Foster* v. *Weston*, 6 Bingh. 709.
(*t*) *Pinhorn* v. *Tuckington*, 3 Camp. 468; *Churcher* v. *Stringer*, 2 B. & Ad. 777; *Johnson* v. *Durant*, 4 C. & P. 327.
(*u*) *De Bernales* v. *Wood*, 3 Camp. 258; *Farquhar* v. *Farley*, 7 Taunt. 592.

damages in an action on a mortgage deed, after the day of default (*x*); or upon a contract to pay money upon a particular day (*y*); or upon a covenant to indemnify a surety (*z*). And it is laid down as a general rule, that although it be not due *ex contractu*, a party may be entitled to damages in the form of interest where there has been long delay under vexatious and oppressive circumstances, in the payment of what is due under the contract (*a*).

Cases in which interest is not recoverable.

Interest cannot be recovered as such in an action against the vendor of an estate, the sale of which has gone off, for recovery of the deposit which has been lying idle (*b*); but it may be recovered as special damages for breach of the contract if so laid (*c*). But the principal and auctioneer stand on a different footing, and in an action against the latter to recover the deposit paid to him, interest cannot be recovered, even as damages, unless perhaps after demand and refusal on the contract being rescinded (*d*). Not even when the auctioneer has made interest upon the money while in his hands; and although he was requested by one of the parties before the completion of the contract to invest it (*e*). Interest is not due as such in an action for money secured on mortgage, after day of default, without covenants to pay interest, but may be recovered as damages (*f*). Nor in an action for money lent, unless there has been an usage to that effect (*g*); or for money had and received (*h*), even though by the course of dealing

(*x*) *Dickenson* v. *Harrison*, 4 Price, 282; *Atkinson* v. *Jones*, 2 A. & E. 439; *Price* v. *G. W. Ry. Co.*, 16 M. & W. 244.

(*y*) *Watkins* v. *Morgan*, 6 C. & P. 661.

(*z*) *Petre* v. *Duncombe*, 20 L. J. Q. B. 242; 2 L. M. & P. 107, S. C.

(*a*) *Hilhouse* v. *Davis*, 1 M. & S. 169; *Arnott* v. *Redfern*, 3 Bingh. 353. [So in Equity, an executor or trustee who unnecessarily retains money which he ought to have invested or paid over, will be made to pay interest. See *per* Lord Chelmsford, C., *Blogg* v. *Johnson*, L. R. 2 Ch. at p. 228; 36 L. J. Ch. at p. 860. By the recent Attorneys' and Solicitors' Act, 1870, 33 & 34 Vict. c. 28, s. 17, taxing officers may allow interest on moneys of the client improperly retained by the attorney or solicitor, and on disbursements made by the latter for the client.]

(*b*) *Bradshaw* v. *Bennett*, 5 C. & P. 48; *Maberley* v. *Robins*, 5 Taunt. 625.

(*c*) *De Bernales* v. *Wood*, 3 Camp. 258; *Farquhar* v. *Farley*, 7 Taunt. 592.

(*d*) *Lee* v. *Munn*, 8 Taunt. 45.

(*e*) *Harington* v. *Hoggart*, 1 B. & Ad. 577.

(*f*) *Ante*, p. 108.

(*g*) *Calton* v. *Bragg*, 15 East, 223; *Shaw* v. *Picton*, 4 B. & C. 723.

(*h*) *Walker* v. *Constable*, 1 B. & P. 306.

between the defendant and the person from whom the money was received to the plaintiff's use, the sum would have borne interest; for "no right passed to the plaintiff but a right to demand the sum actually in defendant's hands" (*i*). And it makes no difference that the money has been obtained by fraud (*k*). Nor in actions for money paid (*l*); or on an account stated (*m*); or for goods sold, even though to be paid for on a particular day (*n*), though it is otherwise where payment was to be made by a bill (*o*). Nor in an action for work and labour (*p*); nor on money lying with a banker (*q*); nor upon a policy of insurance (*r*). [Nor are annuitants entitled to interest on the arrears of their annuities (*s*); nor partners to interest on money drawn out of the firm by a partner in excess of his share of the profits (*t*).] Interest is not recoverable as such in an action upon a foreign judgment, where the subject of the claim is not one which would bear interest in this country (*u*). But it may be left to the jury to say, whether the plaintiff has used proper means to find out the defendant and enforce the judgment; and if they find for him, they may give such interest as they wish (*x*).

Foreign judgments.

Tender; payment into court.

Interest does not run after a tender (*y*). And where a defendant, sued upon a debt which bears interest, wishes to pay money into court, he must pay the interest up to the time of the payment into court. If he merely pay interest up to the

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(*i*) *Frühling* v. *Schrœder*, 2 B. N. C. 79.

(*k*) *Crockford* v. *Winter*, 1 Camp. 124.

(*l*) *Carr* v. *Edwards*, 3 Stark. 132; *Hicks* v. *Marco*, 5 C. & P. 498.

(*m*) *Nichol* v. *Thompson*, 1 Camp. 52, n.; *Chalie* v. *Duke of York*, 6 Esp. 45; *Blaney* v. *Hendricks*, 2 W. Bl. 761; *contrà*, overruled *per* Abbott, C. J., 2 B. & C. 349.

(*n*) *Gordon* v. *Swan*, 12 East, 419; *Mountford* v. *Willes*, 2 B. & P. 337, merely decides that if the jury allow interest, (which they clearly may do as damages,) the court will not disturb their verdict. See 2 Camp. 429.

(*o*) See *ante*, p. 106.

(*p*) *Trelawney* v. *Thomas*, 1 H. Bl. 303; *Milsom* v. *Hayward*, 9 Price, 134.

(*q*) *Edwards* v. *Vere*, 5 B. & Ad. 282.

(*r*) *Kingston* v. *M'Intosh*, 1 Camp. 518; *Bain* v. *Case*, 3 C. & P. 496.

[(*s*) *Earl of Mansfield* v. *Ogle*, 4 De G. & J. 41; *Booth* v. *Coulton*, 30 L. J. Ch. 378; *Blogg* v. *Johnson*, L. R. 2 Ch. 225; 36 L. J. Ch. 859.]

[(*t*) *Rhodes* v. *Rhodes*, Johns. 653; 29 L. J. Ch. 418; *Meymott* v. *Meymott*, 31 Beav. 445; 32 L. J. Ch. 218.]

(*u*) *Doran* v. *O'Reilly*, 3 Price, 250; *Atkinson* v. *Lord Braybrooke*, 4 Camp. 380.

(*x*) As damages it would appear. *Bann* v. *Dalzell*, 3 C. & P. 376; *M'Clure* v. *Dunkin*, 1 East, 436.

(*y*) *Dent* v. *Dunn*, 3 Camp. 296.

commencement of the action, the plaintiff may proceed for the difference (*z*).

Interest must, in all other cases, be calculated up to the time of signing judgment (*a*). Judgment is considered to be signed for this purpose, when the *incipitur* is entered in the Master's book. The moment that entry is made, the plaintiff is entitled to receive his debt and damages, and an unascertained amount of costs. And this right is not affected by an alteration made in the amount at a subsequent period upon a motion (*b*). Time up to which interest is computed.

Interest recovered at law is always 5*l.* per cent. (*c*). Where a contract has been made abroad, it will bear interest at the foreign rate till judgment signed, but only the legal interest of 5*l.* per cent. from the time of signing judgment (*d*). Rate of interest.

II. As to the cases in which interest is given by statute, 3 & 4 W. IV. c. 42, s. 28, enacts, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when *demand of payment* shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand, until the term of payment. Provided that interest shall be payable in all cases in which it is now payable by law." Interest by Statute.

S. 29. "The jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover

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(*z*) *Kidd* v. *Walker*, 2 B. & Ad. 705.

(*a*) *Robinson* v. *Bland*, 2 Burr. 1081.

(*b*) *Fisher* v. *Dudding*, 3 Sco. N. R. 516.

(*c*) Sugd. V. & P. 816; *Upton* v. *Lord Ferrers*, 5 Ves. 803.

(*d*) *Bodily* v. *Bellamy*, 2 Burr. 1096. As to interest on foreign bills, see more fully *post*, c. 8. [Interest which is payable by a special contract upon a bill of exchange, may, after judgment for the principal sum, be recovered in a subsequent action, for a period up to the date of the judgment in the first action; but not for a subsequent period, because the right to interest under the agreement ceases at the date of the judgment; *Florence* v. *Drayson*, 1 C. B. N. S. 584; S. C. nom. *Florence* v. *Jenings*, 26 L. J. C. P. 274.]

or trespass de bonis asportatis, and over and above all money recoverable in all actions on policies of insurance made after the passing of this Act."

Meaning of word "certain."

Under s. 28, a sum will be considered certain, when it can be made so by calculation (*e*). Therefore where a party had paid a number of excessive charges to a railway company under protest, and sued for the balance, it was held that he might recover interest upon it, having made a proper written demand (*f*). But where a party agreed to pay money by a letter in which the following words occurred, "I shall pay all the principal, interest, and costs through a friend of mine in L., to whom a transfer of all the securities will have to be made; the cash will be ready, if the securities will, on the 16th inst.": the securities were in the plaintiff's hands, and were not ready for transfer till some time after the 16th, and the transfer never was effected: it was held that this did not amount to a promise to pay on a day certain. It was also decided in the same case that an acceptance of the above offer, and a subsequent letter concluding, "Will you be good enough to inform us what you now propose to do; you are aware that we hold your undertaking," did not amount to a demand in writing under the above section (*g*). A demand, however, will be a sufficient compliance with the statute, although it does not follow its very words, if it gives the defendant substantial notice that if he keeps the plaintiff's money longer in his hands, he will be held liable for interest upon it, from the time he is served with the demand till the time of payment of the principal. Accordingly, where the notice stated that the plaintiff would expect interest from a period considerably anterior to the date of his letter, it was held sufficient (*h*).

What is a sufficient demand.

Where the defendant is entitled to notice of action under any statute, it seems that the notice must contain a demand of interest. But this defence can only be set up where the want of notice has been pleaded specially. And in such a case, if the action and all matters in difference have been referred to

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(*e*) *Harper* v. *Williams*, 4 Q. B. 219, 224.
(*f*) *Edwards* v. *G. W. Ry. Co.*, 11 C. B. 588; 21 L. J. C. P. 72.
(*g*) *Harper* v. *Williams*, *ubi sup.*
(*h*) *Mowatt* v. *Lord Londesborough*, 3 E. & B. 307; [affirmed in Ex. Ch. 4 E. & B. 1; 23 L. J. Q. B. 38.]

an arbitrator, he may give interest, whether it was demanded in the notice of action or not (*i*).

Written instrument by virtue of which a debt is payable.

[A notice of a call on a contributory, under a voluntary winding-up under the supervision of the Court, stating that interest would be charged if the call were not paid at the time appointed, has been held a sufficient demand (*k*). A mere letter of application for a loan until a day named, is not a written instrument by virtue of which the loan is payable at a certain time, sufficient to satisfy the statute (*l*).]

Discretion of the jury.

Wherever interest is solely given by this statute, the jury are left entirely to their own discretion whether they will grant it or not, and where they think fit to withhold it, the Court will not interfere. Therefore, where the agreement was to pay a debt by half-yearly instalments on specified days, "with interest for the same sums at the rate of 5*l.* per cent. per annum, to be reckoned from the 1st October then next, until the day of payment thereof, such interest to be paid by equal half-yearly payments," it was decided that interest upon the arrears of interest could not be allowed at common law; that it might be given under the stat. 3 & 4 W. IV. c. 42, s. 28, but that as the jury had refused to allow it, the propriety of their decision could not be questioned (*m*). Nor can their decision be questioned, though they give interest at 5*l.* per cent. when this is higher than the current rate of interest at the time (*n*).

Interest can only be given under this statute by the jury. Accordingly, where a plaintiff, after making a demand for the express purpose of obtaining interest, consented to a compromise which deprived him of his right to go before a jury, without stipulating for interest, he was held to have lost his right to it (*o*).

Interest upon judgments.

III. As to interest upon judgments, it is enacted by 1 & 2 Vict. c. 110, s. 17, that every judgment debt shall carry interest at the rate of 4*l.* per cent. from the time of entering up the

(*i*) *Edwards* v. *G. W. Ry. Co.*, 11 C. B. 588; 21 L. J. C. P. 72.

[(*k*) *Re Overend, Gurney & Co., Ex parte Lintott*, L. R. 4 Eq. 184; *Barrow's Case*, L. R. 3 Ch. 784; 38 L. J. Ch. 15. As to liability for interest on calls after forfeiture of the shares, see *Re Blakeley Ordnance Co.* (*Stocken's Case*), L. R. 3 Ch. 412; 37 L. J. Ch. 230.]

[(*l*) *Taylor* v. *Holt*, 3 H. & C. 452; 34 L. J. Ex. 1.]

(*m*) *Attwood* v. *Taylor*, 1 M. & G. 279.

(*n*) *Mowatt* v. *Lord Londesborough*, 4 E. & B. 12.

(*o*) *Berrington* v. *Phillips*, 1 M. & W. 48.

judgment, or from the time of the commencement of the act. The judgments named in this section are judgments of the superior courts of Westminster; and the act equally applies to all such judgments, whether against the defendant, for the subject-matter of the suit, or against the plaintiff for costs (*p*).

The time of entering up judgment for the purpose of this act is from the entry of the incipitur in the Master's book, and not from the final completion of the judgment after the taxation of costs (*q*).

In cases of error.

Where a writ of error is brought upon a judgment, it was formerly discretionary with the Court above to grant interest on the judgment of the Court below. But now, by 3 & 4 W. IV. c. 42, s. 30, "if any person shall sue out any writ of error upon any judgment whatsoever given in any Court, in any action personal, and the Court of error shall give judgment for the defendant thereon, then interest shall be allowed by the Court of error for such time as execution has been delayed by such writ of error for the delaying thereof." This statute is imperative, and interest will be calculated at 4*l.* per cent. (*r*); and may be awarded by the House of Lords (*s*).

(*p*) *Pitcher v. Roberts*, 2 Dowl. N. S. 394; *Newton* v. *Conyngham*, 17 L. J. C. P. 288.

(*q*) *Fisher* v. *Dudding*, 3 Sco. N. R. 516; *Newton* v. *Grand Junc. Ry. Co.*, 16 M. & W. 139.

(*r*) *Levy* v. *Langridge*, 4 M. & W. 337.

(*s*) *Garland* v. *Carlisle*, 5 Cl. & F. 355.

CHAPTER V.

CONTRACTS OF SALE.

I. Contracts for sale of chattels.

1. *Actions for price of goods received.*
2. *Actions for not accepting goods.*
   Actions for not accepting stock or shares.
3. *Actions for not delivering goods.*
   Actions for not replacing stock.
4. *Actions on warranty.*

II. Contracts for sale of land.

1. *Actions for refusal to convey.*
2. *Actions for refusal to accept land.*
3. *Actions on covenant for title.*
   Actions on covenant for quiet enjoyment.
   Actions on covenant for further assurance.
   Actions on covenant against incumbrances.
   Actions on covenant to renew.

UNDER the general head of contracts of sale may be considered several forms of action, the damages in which are governed by analogous principles. They are not only the most ordinary; but the rules connected with them are the simplest, and therefore the most proper to commence with.

Contracts of sale may give rise to actions by the vendor against the vendee, or *vice versâ:* the vendor may sue the vendee for default in payment, or for a refusal to accept; the vendee may sue the vendor for a refusal to deliver, or for a breach of warranty as to the quality of the article. Differences will also arise according to the subject-matter of the contract, which may relate to chattels, such as goods, shares, or stock, or to land. Each of these will require a separate examination.

I. Sales of goods.

Damages where goods have been received.

1. Where the vendee has actually received the goods, of course the action can only be for the price. This case presents no difficulty: the price is generally ascertained by the contract, or is settled by the jury at the fair value of the article. Claims for interest will be regulated by the principles laid down in the preceding chapter (*a*). On the other hand,

(*a*) *Ante*, pp. 105—113.

the defendant may allege that the article is inferior to that for which he had bargained, and may claim a reduction of damages on that account. The principles upon this point have also been discussed at sufficient length in a previous part of this work (*b*).

Or property has passed to defendant.

Even where no delivery to the defendant has been, or can be made, as, for instance, where the sale was of a specific quantity of butter, which was lost by shipwreck, the plaintiff may recover the full price in an action for goods bargained and sold, if the property has passed to the defendant (*c*). Where goods are sold, to be paid for by a bill, which is not given, assumpsit for goods sold and delivered cannot be maintained before the time at which the bill, if given, would have fallen due. But the plaintiff may sue at once for the breach of the special agreement (*d*); and will recover the whole amount of the bill (*e*). It has been suggested in America, that there ought to be a rebate of interest in proportion to the stipulated period of credit (*f*).

Damages for refusing to accept.

2. The defendant may refuse to accept the goods. In this case, if the property has passed to him, the vendor may at his option consider the contract of sale as still unbroken, and recover their entire price in an action for goods bargained and sold, even though they have not been delivered (*g*). He may on the other hand, after the time for acceptance has expired, or any other essential condition has been broken, sue for breach of the contract, even after he has resold the goods (*h*).

Time from which difference of value to be calculated.

In the latter case, the measure of damages is the difference between the contract price and the market price at the time when the contract ought to have been completed (*i*), for the seller may take his goods into the market and obtain the current price for them (*k*). Accordingly where a contract was

(*b*) *Ante*, p. 71.
(*c*) *Alexander* v. *Gardner*, 1 Bingh. N. C. 671.
(*d*) *Mussen* v. *Price*, 4 East, 147.
(*e*) *Hutchinson* v. *Reid*, 3 Camp. 329.
(*f*) *Hanna* v. *Mills*, 21 Wend. 90.
(*g*) *Graham* v. *Jackson*, 14 East, 498.
(*h*) *Maclean* v. *Dunn*, 4 Bingh. 722. It was decided by Lord Ellenborough that an action for goods bargained and sold would be maintainable, even af er a resale by the plaintiff; *Mertens* v. *Adcock*, 4 Esp. 251, but this case, after being several times doubted, has been overruled; *Lamond* v. *Davall*, 9 Q. B. 1030.
(*i*) *Boorman* v. *Nash*, 9 B. & C. 145.
(*k*) *Per Cur.*, *Barrow* v. *Arnaud*, 8 Q. B. at p. 610, in Ex. Ch.

made early in January, to supply a quantity of corn "to be delivered at Birmingham as soon as vessels could be obtained," and on the 26th January defendant gave notice to the plaintiff that he would not accept it if delivered; it was at that time on its way to B., and on its arrival there the defendant was required to accept it, and refused, upon which the action was brought; the question was, whether the damages should be calculated according to the market price on the 26th January, when the notice was given, or the price on the last day when the contract could have been completed, viz., when the wheat was tendered for acceptance. The latter was held to be the proper rule. Lord Abinger, C. B., said, "The proper period at which to calculate the damages was when the defendant ought to have received the goods. The original contract was in no way modified by the notice, and the plaintiffs were not bound then to sell in order to reduce the damages." And Parke, B., said, "The notice amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the mean time, and rescinds the contract" (*l*). In the same case Parke, B., stated his opinion that no action would have lain for breach of contract upon the mere receipt of the notice, but that the plaintiff was bound to wait until the time arrived for the delivery of the wheat, to see whether the defendant would then receive it. This position, however, has been denied by the Queen's Bench, and they have laid it down, that where a refusal to perform a contract can be proved by evidence, which shows that the party has utterly renounced the contract, or has put it out of his own power to perform it, the injured party may at his option sue at once, or wait till the time when the act was to be done (*m*). A similar decision was given in a previous case, the facts of which were as follows.

(*l*) *Philpotts* v. *Evans*, 5 M. & W. 475.

(*m*) *Hochster* v. *De Latour*, 2 E. & B. 678; [*Frost* v. *Knight*, L. R. 7 Ex. 111; 41 L. J. Ex. 78, in Ex. Ch. The refusal to perform the contract must be distinct and unqualified, and must be acted upon as a breach by the person entitled to insist on performance; 2 Smith's L. C. 17, 6th ed.; *Reid* v. *Hoskins*, 4 E. & B. 979; 25 L. J. Q. B. 49; 26 L. J. Q. B. 3; *Avery* v. *Bowden*, 5 E. & B. 714; 6 E. & B. 963; 25 L. J. Q. B. 49; 26 L. J. Q. B. 3; *Danube, &c., Ry. Co.* v. *Xenos*, 11 C. B. N. S. 152; 13 C. B. N. S. 825; 31 L. J. C. P. 84, 284; *Bartholomew* v. *Markwick*, 15 C. B. N. S. 711; 33 L. J. C. P. 145; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C. B. N. S. 733; 34 L. J. C. P. 15; *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 62. (Am.)].

The plaintiffs entered into a contract to supply a railway company with 3900 tons of cast-iron chairs, to be supplied from time to time and paid for on delivery. They received and paid for a certain portion. Others were received at periods later than those specified at the request of the Company's agent, and finally the plaintiffs were directed not to supply any more, as the defendants had no occasion for them, and would not accept or pay for them. A large quantity of the chairs were in consequence never manufactured or tendered; the declaration stated willingness to perform the contract, but that the defendants refused to accept the residue of the chairs, and discharged and prevented the plaintiffs from supplying it. It appeared that the plaintiffs had, for the purpose of fulfilling their contract, entered into arrangements with iron founders for the supply of iron, and enlarged their own foundry. They had also made a sub-contract for the supply of a certain number of chairs, which they had to pay 500*l.* to get rid of. The judge told the jury, the plaintiffs should be put into the same position as they would have been if they had been permitted to complete the contract. The jury gave 1800*l.* damages. It was held that where in the case of an executory contract the purchaser gives notice not to manufacture any more of the goods, as he will not accept or pay for them, the vendor, having been desirous and able to fulfil the contract, may sue at once without manufacturing or tendering the rest. Also that the damages were not excessive, as the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which the defendants refused to accept (*n*). Of course where there is no difference between the contract and market price, or where the difference is in favour of the plaintiff, damages can only be nominal (*o*).

Duty of buyer to carry goods away.

In the absence of any express stipulation, it is the duty of the buyer to carry away the goods bought within a reasonable time, and if he neglects to do so, the seller may charge him warehouse room, or bring an action for not removing them should he be prejudiced by the delay. But he is not entitled to sell them (*p*).

(*n*) *Cort* v. *Ambergate Ry. Co.*, 17 Q. B. 127; 20 L. J. Q. B. 460.

(*o*) *Valpy* v. *Oakeley*, 16 Q. B. 941; 20 L. J. Q. B. 380; [*Griffiths* v. *Perry*, 1 E. & E. 680; 28 L. J. Q. B. 204. And see *per* Martin, B., *Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Ex. at p. 99; 39 L. J. Ex. at p. 46.]

(*p*) *Greaves* v. *Ashlin*, 3 Camp. 426.

Damages for refusal to accept stock or shares.

Exactly the same rule prevails where the contract is for the purchase of stock or shares (*q*). In one case (*r*), it seems to have been thought, that in an action for not accepting shares, the difference between the contract price, and that on the day when they were re-sold by the plaintiff, if at a reasonable time after the repudiation of the contract, and not that on the day of the breach, was to be the measure of damages. But it has been decided by a later case (*s*), that as there is no obligation on the part of the vendor to sell at all, so if he refrain from selling at the time of the breach, he takes upon himself all risk arising from further depreciation. When there have been several refusals to accept, and negotiations on the subject are still kept up, it will be for the jury to decide on what day the contract was finally repudiated (*t*).

Time of breach a question for the jury.

Contracts for shares not in existence,

Where the contract is for the delivery of scrip shares which are not in existence and known not to be so, this limits the time for performing the contract to the first day on which the thing contracted for is *in esse*. Till that day arrives neither party can rescind it without the assent of the other. Therefore if the vendee repudiate the contract before the issuing of the scrip, &c., the vendor may still tender it on the first day it is issued, and damages will be computed from that time and not from the date of the first refusal to accept (*u*). But a contract or order for shares must be understood to be a contract for whatever is understood by that word, in reference to the particular thing bargained for (*x*). Therefore where the defendant contracted to sell plaintiff shares in a projected railway, there being at the time neither scrip nor shares in existence, but he being possessed of a letter of allotment entitling him to be a shareholder; on the 12th of August he refused to perform his contract, and in October the scrip was issued; it

how to be construed.

[(*q*) See as to the vendor's right to an indemnity, if by the buyer's default his name remains on the register of shareholders, and he is obliged to pay subsequent calls; *Walker* v. *Bartlett*, 18 C. B. 845; 25 L. J. C. P. 263; *Grissell* v. *Bristowe*, L. R. 3 C. P. 112; 37 L. J. C. P. 89; L. R. 4 C. P. 36; 38 L. J. C. P. 10; *Coles* v. *Bristowe*, L. R. 4 Ch. 3; 38 L. J. Ch. 81; *Maxted* v. *Paine*, L. R. 4 Ex. 203; 38 L. J. Ex. 129; *Davis* v. *Haycock*, L. R. 4 Ex. 373; 38 L. J. Ex. 155.]

(*r*) *Stewart* v. *Cauty*, 8 M. & W. 160.

(*s*) *Pott* v. *Flather*, 5 Rail. Ca. 85; 16 L. J. Q. B. 366, S. C.

(*t*) *Barned* v. *Hamilton*, 2 Rail. Ca. 624; [*Ogle* v. *Earl Vane*, *post*, p. 122].

(*u*) *Pott* v. *Flather*, *ubi sup.*

(*x*) *Mitchell* v. *Newhall*, 15 M. & W. 308; *Lamert* v. *Heath*, *ib.* 486.

was held that as he might have performed his contract by handing over the letter of allotment, the contract was broken in August, and that the damages must be calculated from that day, and not from the time in October when the scrip was issued (*y*).

Of course the purchaser may bind himself absolutely to pay for the chattel contracted for, whether he accepts it or not. Defendants agreed to buy iron from the plaintiffs, promising to pay for it on the 30th of April, if the delivery was not required before that day. In an action for breach of this contract, it was held that the jury should give the full price of the iron, though no specific iron had been appropriated by the plaintiffs (*z*).

Damages for refusal to deliver goods.

3. Where the action is by the vendee against the vendor for not delivering goods, and no payment has been made, the rule as to damages is the same as in the case last discussed. Their measure is the difference between the contract price, and that which goods of a similar description and quality bore at the time when they ought to have been delivered. Because the plaintiff has the money in his possession, and might have purchased other goods of a like quality the very day after the contract was broken (*a*). [Therefore a buyer cannot recover the loss of profit which he would have made by carrying out a contract for re-sale at a higher price made in the interval between the first contract and the time for delivering (*b*).] The same doctrine prevails in cases where the contract is to be performed on a certain day, and before that time the vendor declines to carry it out. The defendant had agreed to supply the plaintiff with a certain quantity of tallow, to be delivered all in December, at 65*s*. per cwt. On October 1st, when tallow was 71*s*. per cwt., the defendant apprised the plaintiff that the goods were sold to another, and that he would not execute the contract. On the 31st December the

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(*y*) *Tempest* v. *Kilner*, 3 C. B. 249.

(*z*) *Dunlop* v. *Grote*, 2 C. & K. 153.

(*a*) *Gainsford* v. *Carroll*, 2 B. & C. 624; *per Cur. Barrow* v. *Arnaud*, 8 Q. B. 609; [*Peterson* v. *Ayre*, 13 C. B. 353. In one case an attempt was made to obtain larger damages than according to this rule, by showing that part of the contract price was given in consideration of speedy delivery, the contract price being by so much higher than the market price, but the evidence was rejected, against the opinion, however, of Martin, B.; *Brady* v. *Oastler*, 3 H. & C. 112; 33 L. J. Ex. 300. As to shares, see *Powell* v. *Jessopp*, 18 C. B. 336.]

[(*b*) *Williams* v. *Reynolds*, 6 B. & S. 495; 34 L. J. Q. B. 221.]

price of tallow was 81*s*. per cwt. It was held that the damages should be regulated by the price on the 31st December. The Court said, that the contract being mutually made could only be dissolved by the consent of both parties. The defendant had all the month of December to deliver the tallow in, and the plaintiff was bound to receive it until after the 31st. It was said that the plaintiff might have bought other tallow in the market: the answer is, he was not bound to do so; but further, the defendant might have bought other tallow in the market on the 1st October, or any other subsequent day, and have delivered it if he would (*c*). [And quite recently where the defendant had agreed to sell 500 tons of iron to the plaintiff, to be delivered in about equal proportions in the months of September, October and November, he announced in August that he did not intend to deliver any of the iron, alleging that there was no contract. In December the plaintiff brought his action. The measure of damages was held to be the sum of the differences between the contract price and the market price of about one-third of the 500 tons on the 30th of September, the 31st of October, and the 30th of November, respectively (*d*).]

But where the vendor has before the day put it out of his own power to fulfil the contract, as in the case of specific goods, by selling them (*e*); or has refused to fulfil his contract in such a manner as amounts to an utter renunciation of it (*f*); the vendee may, if he wish, treat the contract as rescinded and sue upon it at once. In such a case the damages would be estimated according to the price of the goods at the time of the act, upon which he elected to consider the agreement as broken.

[On the other hand, if the vendee at the vendor's request forbears for some time after the day named for delivery to buy other goods in place of those contracted for, a jury may, and it would seem should, give as damage the difference between the contract price and the price ultimately paid for the substituted goods, although this price may be greater than that at which

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(*c*) *Leigh* v. *Paterson*, 8 Taunt. 540; affirmed, *Philpotts* v. *Evans*, 5 M. & W. 476.

(*d*) *Brown* v. *Muller*, *Weekly Notes*, 15th June, 1872.

(*e*) *Bowdell* v. *Parsons*, 10 East, 359.

(*f*) *Ripley* v. *M'Clure*, 4 Exch. 345; *Hochster* v. *De Latour*, 2 E. & B. 678. [See cases cited, *ante*, p. 117, note (*m*).]

such goods might have been bought at the time when the contract was first broken (*g*).]

Damages when no time is fixed for performance.

In all these cases there was a stated time fixed for the completion of the contract. Where there is no time fixed, damages will be calculated from the period at which the defendant refuses to perform it. Such a refusal leaves no further *locus pœnitentiæ* to himself, and of course the plaintiff cannot treat the agreement as any longer subsisting. Therefore where in such a case the defendant sold the goods to a third party, the measure of damages was held to be the difference between the contract price, and the price at which they were sold (*h*). And in a similar case, where the plaintiff wrote, "I beg to give you notice, that I am prepared to take up the fifty new Bradford's I purchased of you on the 3rd of February last; and if those scrips are not delivered to me on or before the 10th inst., I shall buy them in against you, and debit you with the difference;" Held, that as the plaintiff had given the defendant till the 10th to deliver the shares, he was not entitled to calculate the damages with regard to any amount the shares might have sold for subsequently to the 10th (*i*).

When special damages may be recovered.

Where, however, the contract is to supply goods of a nature which cannot be procured at once by going into the market, and special damage has been incurred in consequence, it may be recovered. [Thus, where the plaintiff bought caustic soda of the defendant, to be shipped in June at Hull for sale, as the defendant knew, abroad, and the defendant delivered only a portion, and that in September, and there was no market in which the plaintiff could buy caustic soda elsewhere, he was held entitled to recover not only the profit which he had lost but also the increased freight and insurance which, by reason of the approach of winter, he was compelled to pay on the portion delivered (*j*).] An action was brought against the defendants for not fulfilling a con-

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[(*g*) *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275; 36 L. J. Q. B. 175; affirmed in Ex. Ch. L. R. 3 Q. B. 272; 37 L. J. Q. B. 77. See *Loder* v. *Kekulé*, 3 C. B. N. S. 128; 27 L. J. C. P. 27.]

(*h*) *Greaves* v. *Ashlin*, 3 Camp. 426.

(*i*) *Shaw* v. *Holland*, 15 M. & W. 136. [See *Cockerell* v. *Van Diemen's Land Co.*, 18 C. B. 484.]

[(*j*) *Borries* v. *Hutchinson*, 18 C. B. N. S. 445; 34 L. J. C. P. 169. As to damages for the non-delivery of a chattel required for a special purpose, see *Cory* v. *Thames Iron Works Co.*, *ante*, p. 16.]

tract to fit up certain machinery within a reasonable time. The declaration laid as special damage the loss of time of the plaintiff's apprentices, who were in consequence kept unemployed; and also the loss they had incurred by being unable to perform a contract entered into with another firm for the supply of bobbin. It appeared that this contract being for the sale of goods above the value of 10*l.* was not valid, for want of writing, under the Statute of Frauds. The first item of damage was allowed without question. As to the second, Alderson, B., said, "The defendants undertook to perform a contract within a reasonable time, and failed to do so; the plaintiffs say, 'We should have made certain profits had the contract been performed.' The jury are not bound to adopt any specific contract that may have been made; but if reasonable evidence is given that the amount of profit would have been as claimed, the damages may be assessed accordingly" (*k*).

Actions for not replacing stock.

In the cases above discussed, no payment has been made for the goods, and on this ground they were distinguished from actions for not replacing stock, because in that case, the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether (*l*). Accordingly, where there has been a loan of stock, and a breach of the agreement to replace it, the measure of damages is held to be the whole value of the stock lent, taken at such a rate as will indemnify the plaintiff. Therefore, where the stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of trial (*m*). And it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring the action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market (*n*). In one case where it had fallen, it was estimated at its price on the day it ought to have been replaced (*o*); and in another case, where no day

(*k*) *Waters* v. *Towers*, 8 Exch. 401; see 22 L. J. Ex. at p. 187.

(*l*) *Per Cur.*, [*Gainsford* v. *Carroll*,] 2 B. & C. at p. 625.

(*m*) *Downes* v. *Back*, 1 Stark. 318; *Harrison* v. *Harrison*, 1 C. & P. 412; *Shepherd* v. *Johnson*, 2 East, 211; *Owen* v. *Routh*, 14 C. B. 327. In the last case the rule stated in the text was laid down as the invariable one, without any reference to a rise or fall in the price.

(*n*) *Per* Grose, J., 2 East, 212.

(*o*) *Sanders* v. *Kentish*, 8 T. R. 162; see 2 East, 212.

was named for its replacement, and it had fallen in value, at its price on the day it was transferred to the borrower (*p*). But the plaintiff cannot recover the highest price which the stock had reached at any intermediate day (*q*), because such a measure involves the assumption that he would have sold out upon that day, which is purely speculative profit. Nor can he claim damages for any profit which he might have made had he possessed the stock, at all events unless his wish to have it back for that express purpose was distinctly communicated to the defendant. Therefore, when the plaintiff lent a Five per cent. stock, which was to be replaced on a fixed day, and after that day government gave the holders an option to be paid off at par, or to commute their stock for Three per cents.; the plaintiff expressed to the defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take the new stock; Held that he was not entitled to recover the price of so much Three per cent. stock as he might have obtained in exchange for his Five per cents. (*r*).

Profits not allowed for.

In the case cited, the profits claimed were both contingent in their nature, and collateral to the breach of contract. But where a bond was given to secure the replacement of stock, and payment in the meantime of sums equal to the interest and dividends, and a bonus was afterwards declared upon the stock, it was held by Sir John Leach, M. R., that in equity, and perhaps even at law, the lender was entitled to be placed in the same situation as if the stock had remained in his name, and was therefore entitled to the replacement of the original stock, increased by the amount of the bonus, and to dividends in the meantime as well upon the bonus as upon the original stock (*s*).

Damages for non-delivery of

The rules established in the case of a loan of stock were

(*p*) *Forrest* v. *Elwes*, 4 Ves. 492.

(*q*) *M'Arthur* v. *Lord Seaforth*, 2 Taunt. 257.

(*r*) *M'Arthur* v. *Seaforth*, *ubi sup.* [But where stock is transferred as security for a loan, the lender of the money has no right to deal with the stock, and if he does so, the borrower is entitled to the profits made; *Langton* v. *Waite*, L. R. 6 Eq. 165; 37 L. J. Ch. 345. A mortgagee who suffers a stock mortgage to continue after the time fixed for replacing the stock, can not in a redemption suit at a subsequent period when the market price is lower, exact the price at the time originally fixed, the mortgagor being entitled to redeem on replacing the stock; *Blyth* v. *Carpenter*, L. R. 2 Eq. 501; 35 L. J. Ch. 823.]

(*s*) *Vaughan* v. *Wood*, 1 Myl. & K. 403.

goods, where payment has been made.

held to be equally applicable where the loan was of mining shares (*t*). There appears to be a great similarity between these cases and that of a contract for the purchase of goods, in which payment is made beforehand. The plaintiff is equally kept out of his money, and therefore equally unable to protect himself by going into the market to buy that which the defendant has agreed to sell him. The defendant has equally the use of the plaintiff's property, and is therefore able to make all the profit by means of it, which the plaintiff could have made. If the case is to be governed by exactly the same rules as that of stock, it will require no further discussion. But upon this point there seems to be very little agreement. In America, the Courts of the different States are in hopeless conflict. In New York, the value of the article is taken at the highest price between the time fixed by contract and the time of trial (*u*) unless there has been undue delay on the part of the plaintiff in prosecuting his claim by action. In such a case the Court was inclined to think the rule of damages should be the value of the article at the commencement of the breach (*x*). In Connecticut it is held that in an action for breach of agreement to deliver, where the money is paid beforehand, the plaintiff may in any case recover the money paid and interest upon it (*y*); while in Pennsylvania, the Court take the distinction between an action for breach of the contract, and an action for money had and received, on the ground of failure of consideration. In the former case they hold that the value of the article at or about the time it ought to be delivered is the measure of damages, even though that value be less than the sum paid. In the latter case the money paid may be recovered (*z*). The only two cases in England which touch the subject specifically do not tend to clear it up very much. In the first the defendant agreed in consideration of 262*l.* 10*s.* to convey five mining shares, as soon as the books should be open. They opened on the 12th of August, and the defendant refused to transfer.

American decisions.

English decisions.

(*t*) *Owen* v. *Routh*, 14 C. B. 327.
(*u*) *West* v. *Wentworth*, 3 Cowen, 82; [*Arnold* v. *Suffolk Bank*, 27 Barb. (N. Y.), 424.]
(*x*) *Clark* v. *Pinney*, 7 Cowen, 681.
(*y*) *Bush* v. *Canfield*, 2 Conn. 485.
(*z*) *Smethurst* v. *Woolston*, 5 Watts & Serg. 106. See all these cases in full, Sedg. Dam. 264—277, [p. 297 *et seq.* 4th ed.].

By that time the value of the shares had fallen to 175*l.* The action was for money had and received. Lord Mansfield held that only the value of the shares on the 12th of August was recoverable, saying, "that although the defendant received from the plaintiff 262*l.* 10*s.*, yet the difference money only of 175*l.* was retained by him against conscience, and therefore the plaintiff, *ex æquo et bono*, ought to recover no more. If the five shares had been of more value, yet the plaintiff could only have recovered the 262*l.* 10*s.* in this form of action" (*a*). So far as this case professes to decide that where a party utterly refuses to perform his contract, he can retain any part of the money paid in consideration of its performance, when sued for money had and received, it may be doubted whether it is law now (*b*). This species of action was in its infancy in Lord Mansfield's time, and he seems not to have noticed the inconsistency of allowing the defendant to shelter himself, under the contract, from the effects of an action whose very foundation was the fact of the contract being at an end. So far, however, as the decision shows, by implication, that in an action on the contract, damages would be measured by the value of the article at the time of breach, it goes in support of the doctrine maintained in Pennsylvania.

It must be observed that this decision, as affecting mining shares, is contrary to the very recent one of *Owen* v. *Routh* (*c*), unless a distinction be drawn between the case of a purchase of shares, paid for in advance, and a loan of shares, to be returned on a given day.

Startup v. *Cortazzi.*

It is difficult to discover what principle is to be extracted from a much later case than that just discussed. The defendants agreed to sell and deliver on board plaintiff's vessel, at Odessa, a certain quantity of linseed at 30*s.* per quarter. For half of this they were paid in advance, but on the arrival of the vessel at Odessa the defendants refused to deliver the linseed. In February when the cargo would have arrived in England, if it had been delivered at Odessa, the price was from 47*s.* to 50*s.* At the time of trial it would have been about 56*s.* The defendants paid money into court sufficient

(*a*) *Dutch* v. *Warren*, 2 Burr. 1010.
(*b*) See Chitt. Cont. 543, [562, 9th ed.]; 1 Wms. Saund. 269 (*c*); [1 Wms. Notes to Saund. 367]; Anon., 1 Stra. 407; *ibid.* 406, (*n*), 3rd edit.
(*c*) 14 C. B. 327.

to cover damages at the rate of 47*s*. The plaintiffs claimed to have them estimated at 56*s*. The jury found that the former sum was sufficient. On the motion for a new trial, (which was refused), Lord Abinger, C. B., explained the grounds of the verdict as follows: "The plaintiffs did not prove that they wanted this seed for any particular purpose, or that they sustained any peculiar injury from its non-delivery. The plaintiffs, however, insisted that they were entitled to the profits which they might possibly have made upon it, if it had been delivered. The jury appeared to me to wish to give no more than the money advanced, and the interest upon it. I am not aware of any rule for estimating damages for speculative profits, besides taking the interest on the money advanced. It was not proved that the plaintiffs could have made more than 5 per cent. on that money; or that they had not credit at their banker's to that extent, and thereby had sustained any inconvenience." And Alderson, B., said, "The price at the time of notice was not the proper criterion for estimating the damages: for as the plaintiffs had already parted with their money, they were not then in a situation to purchase other seed. The more correct criterion is the price at the time when the cargo would have arrived in due time, according to the contract; when, if it had been delivered, the plaintiffs would have been enabled to resell it. Another criterion is, to consider the loss of the gain which the party would have made, if the contract had been complied with. In the present case, the loss which the plaintiffs have sustained arises from their being kept out of their money. That is a matter to be calculated by the interest of the money up to the time when, by the course of practice, the money could have been obtained out of Court" (*d*). It will be observed that the finding of the jury in this case may have proceeded from either of two principles, which have nothing in common, and which are both sanctioned by the Court. They did, in fact, give damages proportioned to the price of the article at the time it ought to have been delivered to the plaintiffs, so as to be turned to profit. This is in accordance with the doctrine of Pennsylvania, and of *Dutch* v. *Warren*. But whether they chose the sum because it did accord with that price, and were

(*d*) *Startup* v. *Cortazzi*, 2 C. M. & R. 165.

merely fortified in their conclusion by finding that it amounted to a return of principal and interest; or whether they chose it because it amounted to principal and interest, without any reference to any other circumstance, we cannot tell. If the former was their reason, we have the judgment of Alderson, B., that it was the more correct criterion. If the latter, we have also the opinion of the same Baron that it was another criterion; and the judgment of Lord Abinger, who says that he was not aware of any other way of estimating damages for speculative profits. This opinion, by-the-bye, is in remarkable accordance with that so recently thrown out by the Court of C. B., in the case of *Fletcher* v. *Tayleur* (*e*).

Further discussion of the point.

Such is the unsettled state of the law upon the subject. Mr. Sedgwick is of opinion that the period of breach is the true time, in all cases, for estimating the damages, unless it can be shown that the article was to be delivered for some specific object known to both parties at the time, and that thus a loss within the contemplation of both parties has been sustained (*f*). This doctrine cannot be maintained in England, if, as he also thinks, there is no solid reason for making any difference between stock and any other vendible commodity. It is quite settled that the price of stock may be taken at the time of trial (*g*). The cases may, however, be distinguished on the ground that stock may be supposed to be purchased rather as an investment than for resale, while goods are bought expressly to sell again. Consequently it may be assumed that the former would have remained in the possession of the buyer till the time of trial, while no such presumption can be raised in the latter case. If this be so, damages might fairly be calculated in regard to stock, at the price it bore at the time of trial; in regard to goods, according to their price at the latest period when we could be sure they would have remained in the plaintiff's hands, viz., the time they ought to have been delivered. This rule could produce no practical injustice, for if ever this price proved less than that paid, the plaintiff would have it in his power to treat the contract as rescinded, and sue for money had and received, as on a failure of consideration.

(*e*) 17 C. B. 21. *Ante*, p. 12.
(*f*) Sedg. Dam. 276, [310, 4th ed.].
(*g*) *Ante*, p. 123.

Whatever is finally settled to be the rule where goods have been paid for in advance, will equally apply where payment has been made by bills, as long as they are current. But when they are dishonoured the vendor is just in the same position as if no bill had been given at all, and in an action against him, only the difference of price can be recovered (*h*).

Damages when goods paid for by bill, which is dishonoured.

[By the Mercantile Law Amendment Act, 1856, (19 & 20 Vict. c. 97), s. 2, where specific goods have been sold, the Court may order execution to issue for their delivery, and the jury may be directed to find, by their verdict, what the goods are, what sum the plaintiff would have been liable to pay for their delivery, what damages, if any, he would have sustained if the goods should be delivered under execution, and what, if not so delivered.]

Order for specific delivery of goods.

4. In actions upon a warranty, the damages may depend considerably upon the fact of the article having been returned or not; this will in many cases be a matter entirely at the option of the vendor. If a specific article has been sold with a warranty, and is found not to answer it, the vendee cannot force the vendor to take it back, after he has received it (*i*), nor, it seems, can he even refuse to receive it (*k*). Where, however, the articles purchased are not ascertained when the bargain is made, the purchaser may refuse to receive them, or send them back, having only kept them a reasonable time to ascertain their insufficiency (*l*).

Actions on a warranty.

Right to return goods.

When the thing sold has been returned, and no special loss has accrued, the damages consist of the price paid (*m*). If, however, no payment has been made, the damages could, it is apprehended, be merely nominal. As the contract is rescinded,

Damages when article has been returned.

(*h*) *Valpy* v. *Oakeley*, 16 Q. B. 941; 20 L. J. Q. B. 380; [*Griffiths* v. *Perry*, 1 E. & E. 680; 28 L. J. Q. B. 204.]

(*i*) *Street* v. *Blay*, 2 B. & Ad. 456; *Gompertz* v. *Denton*, 1 C. & M. 207.

(*k*) *Dawson* v. *Collis*, 10 C. B. 523. [Where the property in the specific chattel has passed by the contract, it is settled that the purchaser cannot reject it. See 2 Smith's L. C. 26, 6th ed.; *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447; 36 L. J. Q. B. 270.]

(*l*) *Okell* v. *Smith*, 1 Stark. 107; *Street* v. *Blay*, *ubi sup.* [*Azemar* v. *Casella*, L. R. 2 C. P. 431; 36 L. J. C. P. 124; affirmed in Ex. Ch. L. R. 2 C. P. 677; 36 L. J. C. P. 263; *Bannerman* v. *White*, 10 C. B. N. S. 844; 31 L. J. C. P. 28. The vendee is not bound to send the goods back, but may call on the vendor to take them away. See *Lucy* v. *Mouflet*, 5 H. & N. 229; 29 L. J. Ex. 110.]

(*m*) *Caswell* v. *Coare*, 1 Taunt. 566.

in the one case it was alleged as an independent offence, from which special damage accrued; in the other as a cause justifying dismissal, and therefore negativing all claim to wages.

Expense of keep.

When the vendor refuses to take back the article, the vendee may recover all expenses necessarily caused by its lying on his hands till it can be resold; as for instance the keep of a horse. But the time must be a reasonable one, and what is a reasonable time is a question for the jury, and depends upon the circumstances of each case (*u*). But no damages can be recovered on this account, unless the purchaser has tendered the article to the seller (*x*).

Damages where article bought for a specific purpose.

When a contract embodying a warranty is entered into with reference to a particular purpose, damages ought to be given for the loss incurred by the failure of that purpose. Where the article sold was scarlet cuttings, which were shreds of scarlet cloth used in trade with China, and the declaration alleged that they were not scarlet cuttings, whereby they were of no use or value to the plaintiff, Lord Ellenborough told the jury that, under these words, they were to consider the effect of their being of no use or value in China. "I am decidedly of opinion," he said, "that the value is to be understood as the value which the plaintiff would have received had the defendant fully performed his contract;" and this view was supported by the Court on a motion for new trial (*y*). In another case, where a link in a chain cable, which had been sold with warranty, broke, it was held that the value of the anchor which was lost along with it might be recovered (*z*). But this case was treated as of no authority in *Hadley* v. *Baxendale* (*a*). And Alderson, B., said that on the same principle the jury might have given the value of the ship, if it had been lost. In a recent case, where a passenger vessel was warranted to start on a particular day, and did not, the plaintiff was held entitled to recover not only the passage money, but his expenses incurred while waiting (*b*).

(*u*) *Chesterman* v. *Lamb*, 2 A. & E. 129; *Ellis* v. *Chinnock*, 7 C. & P. 169.

(*x*) *Caswell* v. *Coare*, 1 Taunt. 566. *Quære*, ought there not to be a set-off against this item of damage, where the article has been used beneficially, as, for instance, a horse?

(*y*) *Bridge* v. *Wain*, 1 Stark. 504.

(*z*) *Borrodaile* v. *Brunton*, 8 Taunt. 535.

(*a*) 23 L. J. Ex. 180.

(*b*) *Cranston* v. *Marshall*, 5 Exch. 395.

[Where seed barley was sold, warranted to be Chevallier seed barley, and, on being sown, produced a crop of inferior quality, the natural amount of damage was considered to be the difference between the value of the inferior crop and of that which would have come up if Chevallier seed barley had been sown (*c*). In this case claims for compensation had been made upon the plaintiffs by various persons to whom they had sold the seed barley with a similar warranty. It was held that the plaintiffs might recover the amount of the damages sustained by the sub-purchasers without having previously made them compensation. The plaintiffs were under clear legal liability to compensate them, and it was for the jury to assess, once for all, the probable amount which they would have to pay (*d*).]

Expense incurred in advancing value of the article.

It is still an undecided point whether the plaintiff can recover any expenses he has been at in advancing the value of the thing sold. The question arose in the following manner: The defendant sold a horse to the plaintiff, with warranty, for 45*l.*, and the latter resold it to C. for 55*l.* On discovering its unsoundness, he had to give up his bargain with C. and he then sued the defendant, stating the loss of his bargain as special damage. It was contended that the additional 10*l.* for which the animal could have been resold might be recovered as the amount of expense and care bestowed on the horse, by which its actual value was raised. Coleridge, J., said, "The plaintiff cannot recover upon this record. The declaration merely alleges that the plaintiff bought the horse for so much, and sold him at so much more, not alleging any cause of the advance. This shows only that the plaintiff is seeking to recover for a good bargain lost: which, it is admitted, cannot be done." Patteson, J., said, "Whether or not he could have recovered if the damage had been differently laid, it is not necessary to say" (*e*). In the particular case it is quite clear that the plaintiff had not added 10*l.* worth of value to the horse, for it ultimately sold only for 17*l.* 4*s.*, and it is incredible that it could have been only worth 7*l.* 4*s.* when it came into

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[(*c*) *Randall* v. *Raper*, E. B. & E. 84; 27 L. J. Q. B. 266; *Passenger* v. *Thorburn*, 35 Barbour (N. Y.), 17; *Ferris* v. *Comstock*, 33 Conn. 513.]

[(*d*) *Randall* v. *Raper*, *supra*; and see *Dingle* v. *Hare*, 7 C. B. N. S. 145; 29 L. J. C. P. 143.]

(*e*) *Clare* v. *Maynard*, 6 A. & E. 519.

his possession. If the value were really added, however, it is difficult to see how it could form a claim for damage. Suppose a young horse, with a latent defect that renders it only worth 20*l.*, is sold with a warranty for 40*l.*, and the purchaser by skilful training adds so to its real value, that if sound it would sell for 60*l.*, but with its blemish will only sell for 40*l.*, and does sell for that price. Here, on the principle stated before, he will obtain the difference between its value sound and unsound, which appears to be 20*l.* His skill in training has been paid for already, in the increased price of the horse, and there can be no reason why it should be paid for again. Of course it would be very different, if, in consequence of the unsoundness, all his labour and expense had been utterly thrown away, or produced much less result than they ought. In such a case the question would probably be, whether it was bought with a view to any purpose which would render such labour and expense necessary, the purpose being part of the contract. As, for instance, if an untrained horse were bought for a lady's use, and warranted free from vice. If it turned out incorrigibly vicious, it never would be fit for the purpose, and yet the preliminary training must have been contemplated by the seller. Under such circumstances, the expenses would appear to be fairly recoverable, not because they had added to the value of the animal, but precisely because they never could.

Costs of former action.

Where an article sold with a warranty has been resold with a similar warranty, and the second purchaser, on discovering the defect, brings an action against his vendor, the costs incurred in this action are sometimes recoverable, as damages, in an action by the first purchaser against his vendor. This subject, however, has been sufficiently discussed in a previous chapter (*f*).

Fraud.

[Where a warranty is in fact a fraudulent misrepresentation of the character or condition of the goods, the vendor is responsible for all injury which is the direct and natural result of the purchaser's acting on the faith of his representation. Therefore, where a cattle dealer fraudulently represented a cow to be free from infectious disease when he knew that it was not so, and the purchaser placed it with five others

(*f*) *Ante*, p. 53.

which caught the disease and died, the latter was held entitled to recover as damages in an action for fraudulent misrepresentation the value of all the cows (*g*).]

II. Sales of Land.

1. Actions by vendee against vendor for refusal to convey.

Actions for breach of contract to convey land.

Where the vendor is unable to complete the contract which he has entered into, the vendee may sue him for its breach, and in such an action he is always entitled to recover the deposit with interest, as special damage when so laid (*h*); or, even without being laid, from the day of demand under 3 & 4 W. IV. c. 42, s. 28; he is also entitled to the expenses of investigating title (*i*), such as comparing deeds, searching for judgments, and journeys for that purpose (*k*), even though he has not paid his attorney's bill before commencing the action (*l*).

Damages when contract void.

Of course in no case can any action be brought on the contract to sell, unless there has been a binding one. But where the contract is for any reason void, the purchaser may recover the deposit or purchase money, and a moiety of the auction duty, if payable by purchaser, as money had and received to his use, but neither interest (unless under 3 & 4 W. IV. c. 42, s. 28) nor expenses of investigating title (*m*). At any time up to the completion of the purchase the purchaser may rescind the contract, and recover his money on account of defect of title; but he cannot do so once the

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[(*g*) *Mullett* v. *Mason*, L. R. 1 C. P. 559; 35 L. J. C. P. 299; *Sherrod* v. *Langdon*, 21 Iowa. 518. Similar damages seem to have been recovered where there was no fraud, but the beast was warranted free from disease, and both parties contemplated its being placed with other stock; *Knowles* v. *Nunns*, 14 L. T. N. S. 592. It is illegal to bring a glandered horse into a public market or fair, but there is nothing illegal in a simple sale; therefore a person who sold a glandered horse without warranty, and without fraudulent misrepresentation, was held not responsible for disease communicated to other horses of the purchaser's in the stable to which he removed it; *Hill* v. *Balls*, 2 H. & N. 299; 27 L. J. Ex. 45.]

(*h*) *De Bernales* v. *Wood*, 3 Camp. 258; *Farquhar* v. *Farley*, 7 Taunt. 592. [As to the vendee's liability to pay interest upon the purchase-money from the day fixed for completion, under the common condition of sale to that effect, see *Williams* v. *Glenton*, L. R. 1 Ch. 201.]

(*i*) *Walker* v. *Moore*, 10 B. & C. 416.

(*k*) *Hodges* v. *Lord Litchfield*, 1 Bingh. N. C. 492; *Orme* v. *Broughton*, 10 Bingh. 533.

(*l*) *Richardson* v. *Chasen*, 10 Q. B. 756. [The vendee's attorney cannot sue the vendor; *Wilkinson* v. *Grant*, 18 C. B. 319; 25 L. J. C. P. 233.]

(*m*) *Gosbell* v. *Archer*, 2 Ad. & Ell. 500.

purchase is finally closed, and the conveyance fully executed by all the parties whose assent is necessary (*n*). Where he has purchased different lots, he may abandon one for defect of title and keep the others, but he cannot retain part and give up part of the same purchase (*o*). Each lot set up at an auction is a distinct sale (*p*).

What damages cannot be recovered.

But he cannot recover expenses incurred previous to the time fixed for the performance of the contract, which the party enters into for his own benefit (*q*); nor the expense of surveying the estate (*r*); nor of a conveyance drawn in anticipation of the purchase being completed (*s*), unless the vendee, by the misrepresentations of the vendor, and without laches on his own side, has been induced to think that everything had been satisfactorily ascertained (*t*); nor the costs of a Chancery suit for specific performance, when brought by the vendor against the vendee (*u*); or *vice versâ* (*x*); [nor costs incurred after it was known that a good title could not be made out (*y*);] nor the profits arising from a resale of the estate, unless perhaps where there was fraud in the original vendor; nor the expenses of such resale; nor the sums which he was liable to pay to the sub-contractors for the expenses incurred by them in investigating the title; for all this damage arose from his own premature act, and not from the fault of the vendor (*z*); nor losses arising from the resale of stock procured for the estate (*a*); nor the value of improvements made upon the premises, though the agreement to let expressly contemplated such improvements being made, and

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(*n*) *Johnson* v. *Johnson*, 3 B. & P. 162.

(*o*) *Ibid.*

(*p*) Sm. Merc. Law, Sale; *Emmerson* v. *Heelis*, 2 Taunt. 38.

(*q*) *Hodges* v. *Litchfield*, *supra*; *Hanslip* v. *Padwick*, 5 Exch. 615, *ante*, p. 40.

(*r*) *Ibid.*

(*s*) *Ibid.*; *Jarmain* v. *Egelstone*, 5 C. & P. 172.

(*t*) *Richards* v. *Barton*, 1 Esp. 268.

(*u*) *Hodges* v. *Litchfield*, *supra*.

(*x*) *Malden* v. *Fyson*, 11 Q. B. 292; overruling *Jones* v. *Dyke*, Sug. V. & P. 1078, 11th ed.; and see *ante*, p. 43, 45.

[(*y*) *Pounsett* v. *Fuller*, 17 C. B. 660; 25 L. J. C. P. 145; *Sikes* v. *Wild*, 1 B. & S. 587; 30 L. J. Q. B. 325; affirmed 4 B. & S. 421; 32 L. J. Q. B. 375.]

(*z*) *Walker* v. *Moore*, 10 B. & C. 416.

(*a*) *Hodges* v. *Litchfield*, *supra*; [*Godwin* v. *Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121.]

stated "that it was understood by and between the parties, that the defendant was possessed of the said premises for his own life, and the life of one Mrs. M., and the survivor of them." which turned out not to be the case. Damages were limited to 40*s.*, found by the jury to be the worth of the lease (one for two years) without the improvements, on the day when plaintiff offered to take it (*b*). Nor can the vendee recover as damages the loss incurred by selling out stock with a view to the completion of the bargain, for the plaintiff had a chance of gaining as well as losing by the fluctuation of the price" (*c*).

Damages for the loss of plaintiff's bargain.

As to when a vendee is entitled to damages for the loss of his bargain, the cases run rather close. *Primâ facie*, where a party sustains loss by reason of a breach of contract, he is entitled, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed (*d*). This rule of common law has been qualified, as to sales of real property, by some cases which decide that in general, contracts for the sale of real estate are on condition that the vendor has good title, and that in the absence of fraud, no damages can be recovered for the goodness of the bargain which he fancies he has lost (*e*).

Upon this rule, however, a further exception has been engrafted, viz., that where a vendor offers to sell without any title at all, as where he had merely contracted for the purchase of the estate which he professed to sell (*f*), or where he had only an equitable claim upon the rents, and not the legal estate (*g*), the vendee may recover the loss he has sustained by the non-performance of the contract, as in any other case.

[In recent cases vendees having a mere equitable title (*h*), or having no title at all without the assent of a third person, but having fair reason to believe that they would be able to

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(*b*) *Worthington* v. *Warrington*, 8 C. B. 134; 18 L. J. C. P. 350.
(*c*) *Per* Blackstone, J., *Flureau* v. *Thornhill*, 2 W. Bla. 1078.
(*d*) *Robinson* v. *Harman*, 1 Exch. 855; 18 L. J. Ex. 202.
(*e*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Walker* v. *Moore*, 10 B. & C. 416; [*Buckley* v. *Dawson*, 4 Ir. C. L. 211.]
(*f*) *Hopkins* v. *Grazebrook*, 6 B. & C. 31. [So in America, *Brinckerhoff* v. *Phelps*, 43 Barb. 469.]
(*g*) *Robinson* v. *Harman*, 1 Exch. 850; 18 L. J. Ex. 202.
[(*h*) *Pounsett* v. *Fuller*, 17 C. B. 660; 35 L. J. C. P. 145.]

make a good title (*k*), and acting in good faith, have been held to come within the qualified rule relating to sales of real property laid down in the case of *Flureau* v. *Thornhill*, and not within the exception engrafted upon it by the cases of *Hopkins* v. *Grazebrook* and *Robinson* v. *Harman*. Some doubt has even been expressed as to the soundness of the exception in any point of view, on the ground that fraud or misconduct on the part of the vendor ought not to alter the rule by which damages for the breach of contract are to be assessed. But the reason for the anomalous rule restricting the damages is that from the complicated nature of our law of real property no man can be certain that he has a perfect title to his estates, and therefore it is assumed to be part of every bargain for the sale of real property that if the vendor fails to make a good title he shall not be liable to reimburse the full measure of damages which would be awarded in an ordinary case, but the bargain shall be off, and the purchaser take back his deposit with interest, and the expenses, if any, of investigating the title (*l*). And as was said on a very recent occasion, when the whole subject was discussed, a man who undertakes to sell what he has not secured the command of has only himself to blame, and ought not to be protected by a rule which has reference solely to difficulty in making out title (*m*).]

Damages when failure is not from want of title.

Of course the [ordinary] rule [of common law] applies where the cause of failure arises from some other source than want of title. In such a case the plaintiff may recover for any special damage he has received, as, for instance, loss in his trade by not getting settled in his house (*n*). [Thus where vendors declined to give possession, on the ground of the expense to which they would be put in ejecting a trespasser, the vendee recovered not only his deposit and the expenses of investigating the title, but also the profit which it was shown he could have made on a re-sale (*o*).] And so, where the

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[(*k*) *Sikes* v. *Wild*, 4 B. & S. 421; 32 L. J. Q. B. 375; *Bain* v. *Fothergill*, L. R. 6 Ex. 59; 40 L. J. Ex. 34.]

[(*l*) *Per* Blackburn, J., *Lock* v. *Furze*, L. R. 1 C. P. at p. 453; 35 L. J. C. P. at p. 144.]

[(*m*) *Per* Cockburn, C. J., *Engel* v. *Fitch*, L. R. 3 Q. B. at p. 330; 37 L. J. Q. B. at p. 150.]

(*n*) *Ward* v. *Smith*, 11 Price, 19.

[(*o*) *Engel* v. *Fitch*, L. R. 3 Q. B. 314; 37 L. J. Q. B. 145; affirmed,

plaintiff having recovered a judgment for 280*l.* against B., agreed with the defendant to withhold execution until a certain day, in consideration of which the defendant agreed that he would, on or before that day, erect a house, and cause a lease of it to be granted to plaintiff—such lease, when granted, to be in satisfaction of the judgment; the defendant broke his agreement, and it was held that the measure of damages was the value of the house, and that it was properly estimated at 280*l.*, being the value of the thing which the plaintiff had agreed to give up in consideration of it (*p*).

[Where a purchaser is entitled to damages for the loss of his bargain, if the vendor has re-sold the estate, the price at which it has been re-sold is *primâ facie* evidence of the market value, and the first vendee will be entitled to recover the difference between it and the price which he had contracted to pay (*q*).]

Liquidated damages.

It is of course competent to the parties to fix the measure of damages on breach of contract: therefore, where the plaintiff agreed to lend defendant money on mortgages, and defendant was to make out title within a specified time, in default of which the agreement should on the part of the plaintiff, if he thought proper, be utterly void; and it was further agreed "that the defendant should pay to the plaintiff all costs and charges incurred by him or them in investigating the title to the said premises, and of any deeds or other instruments which must have been prepared in consequence of the said agreement, if the same should have been prepared at the desire of the defendant;"—it was held that the plaintiff could set up no claim for interest on money which lay idle in his hands for several months, before the treaty finally failed, though he had informed plaintiff of this fact, without however making any stipulation as to interest (*r*).

Doubtful title.

A purchaser is not bound to accept a doubtful title (*s*),

L. R. 4 Q. B. 659; 38 L. J. Q. B. 304. And see *per* Turner, L. J., *Williams* v. *Glenton*, L. R. 1 Ch. at p. 209; 35 L. J. Ch. at p. 288.]

(*p*) *Strutt* v. *Farlar*, 16 M. & W. 249.

[(*q*) *Engel* v. *Fitch*, L. R. 4 Q. B. at p. 667; 38 L. J. Q. B. at p. 306; in Ex. Ch. *Godwin* v. *Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121.]

(*r*) *Sweetland* v. *Smith*, 1 C. & M. 585.

(*s*) *Hartley* v. *Pehall*, Peake, N. P. C. 178; *Wilde* v. *Fort*, 4 Taunt. 334; *Jeakes* v. *White*, 6 Exch. 873; *Penniall* v. *Harborne*, 11 Q. B. 368.

even with an indemnity (*t*); and where the vendor does not show a clear title by the day specified, the purchaser may rescind the contract and recover back his money, without waiting to see whether the seller may ultimately be able to establish his title or not (*u*), even in a case where on such title being finally made out, a Court of Equity would compel the vendee to accept the estate and pay the money (*v*).

Where however the purchaser has been let into possession of the land, so that the parties cannot be replaced in *statu quo*, he cannot rescind the contract, and sue for his deposit as money had and received. His remedy is on the contract (*x*).

Damages for vendor's delay.

[In a suit for specific performance damages are not awarded under 21 & 22 Vict. c. 27, s. 2, for the vendor's delay in completing his contract, where it is a case of fee simple property, nor unless there has been special damage, as from destruction of the property in the mean time, or from effluxion of time in a short lease (*y*).]

Actions for refusal to complete purchase of land.

2. Actions against the vendee of land by the vendor for refusal to complete his contract, stand on exactly the same footing as actions for not accepting goods (*z*). In one case the plaintiff in an action of this sort seems to have recovered the whole purchase money (*a*). But it is now decided that that is not the correct rule. "The plaintiff cannot have the land and its value too."

"The measure of damages is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is, how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract" (*b*)? Accordingly, where defendants had been put into possession of land under an agreement to purchase,

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(*t*) *Blake* v. *Phinn*, 3 C. B. 976.
(*u*) *Wilde* v. *Fort*, 4 Taunt. 334.
(*v*) *Ibid.* 334; *per* Lord Ellenborough, *Seaward* v. *Willock*, 5 East, 208.
(*x*) *Hunt* v. *Silk*, 5 East, 449; *Blackburn* v. *Smith*, 2 Exch. 783.
[(*y*) *Chinnock* v. *Marchioness of Ely*, 34 L. J. Ch. 399.]
(*z*) 7 M. & W. 478. [A railway company which, after giving a statutory notice of intention to take lands, fails to take the necessary steps for assessing the compensation, is responsible for damage sustained by the owner; *Morgan* v. *Metropolitan Ry. Co.*, L. R. 3 C. P. 553; 37 L. J. C. P. 265.]
(*a*) *Hawkins* v. *Kemp*, 3 East, 410.
(*b*) *Laird* v. *Pim*, 7 M. & W. 474.

and had taken from it a quantity of brick clay, the damage was held to be the interest on the purchase-money up to the commencement of the action, and the value of the clay (*c*). The usual conditions of sale by auction are, that if the vendee fail to complete the purchase, the vendor may sell and the vendee shall pay expenses of resale, and make good the deficiency of price, if any (*d*).

Where a contract for sale contained the following stipulation—"Lastly, if the purchaser shall neglect or fail to comply with any of the above conditions, the deposit shall be forfeited as liquidated damages to be retained by the vendors;" Held that this applied only to a breach of the conditions of sale, but not to a breach of the entire contract to buy, and that on a wrongful abandonment of the purchase the vendor might recover damages beyond the amount of deposit (*e*).

[Where parties contract, as they frequently do by a condition of sale, that the deposit money shall be forfeited if the purchaser fail to carry out his contract, the deposit cannot, nor can any part of it, be recovered back on the ground that the forfeiture was in the nature of a penalty, and the actual loss to the vendee was less than the amount of the deposit (*f*). In fact, the cases distinguishing between a penalty and liquidated damages do not apply to a pecuniary deposit, which is not in reality a pledge but a payment in part of the purchase-money (*g*). It results from this that if the seller seeks to recover damages beyond the amount of the deposit, he must give credit for the deposit which he has retained. Therefore, where a contract for sale contained a condition that if the purchaser should fail to comply with the conditions the deposit should be forfeited to the vendor, who should be at liberty to resell, and any deficiency upon resale, together with the expenses, should be made good by the defaulter, and on non-payment should be recoverable as liquidated damages, but that any increase of price at the second sale should belong to the

(*c*) *Laird* v. *Pim*, 7 M. & W. 474.
(*d*) *Ex parte Hunter*, 6 Ves. 94.
(*e*) *Icely* v. *Grew*, 6 Nev. & M. 467.
[(*f*) *Hinton* v. *Sparkes*, L. R. 3 C. P. 161; 37 L. J. C. P. 81.]
[(*g*) Sugd. Ven. & Pur. c. 1, s. iii. § 18, p. 40, 13th ed.]

vendor; it was held that, in estimating the loss on a resale, the deposit, although forfeited, was to be taken into account as diminishing the deficiency (*h*).]

Damages on covenants for title and against incumbrances.

3. Analogous to the case of warranties in sale of chattels, are the various covenants for title, authority to convey, quiet enjoyment, and against incumbrances which are usual upon transfers of real property.

The cases upon this point in England are very scanty, while they are to be found in remarkable abundance in America. It is to be regretted that the multiplication of courts of independent jurisdiction in that country should make their decisions often a source of embarrassment, rather than an assistance in legal investigation.

Actions may be brought for breach of the covenant for title, and authority to convey, before any eviction or disturbance of the plaintiff has taken place (*i*). What ought to be the amount of damages under such circumstances?

Where something has passed to the plaintiff by the grant.

It is plain that the conveyance may, notwithstanding the defect of title, pass something to the covenantee, or it may in fact pass nothing at all. The former state of facts occurred in a very old case. "B. covenants that he was seised of Bl'acre in fee simple, when in truth it was copyhold land in fee, according to the custom. By the Court. The covenant is broken (*k*). And the jury shall give damages, in their consciences, according to that rate, that the country values fee simple land, more than copyhold land (*l*)." This is exactly the same rule as we have seen before in the case of warranty of chattels personal; namely, that the measure of damages is the difference between the value of the thing as it is, and its value as it was warranted to be (*m*). And so in a case in New York, where, on a similar covenant, it turned out that the grantors had the fee in two-sixths of the premises, and a life estate in the remainder, the Court said, "There is no settled rule of law to ascertain the damages in such a case without having a jury to assess them, as they

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[(*h*) *Ockenden* v. *Henly*, E. B. & E. 485; 27 L. J. Q. B. 361.]
(*i*) *Kingdon* v. *Nottle*, 4 M. & S. 53; [*Ex parte Elmes*, 33 L. J. Bkcy. 23.]
(*k*) *Not broken*, in the original, but clearly by a misprint.
(*l*) *Gray* v. *Briscoe*, Noy, 142.
(*m*) *Ante*, p. 130.

must depend principally upon the value of the estate during the lives of the defendants, which must be deducted from four-sixths of the consideration money. Nor ought interest to be allowed during their lives; for no one during that time will have a right to turn the plaintiff out of possession, or call upon him for the mesne profits" (*n*). On the other hand, the defect in the title may be so complete as to pass nothing from the grantor to the grantee. In such a case, in Massachusetts, it was said, "The rule for assessing the damages arising from this breach is very clear. No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of the covenant; he has lost only the consideration he paid for it. This he is entitled to recover back, with interest to this time" (*o*). And it has been stated by Patteson, J., that where a mortgage is made with covenant for title, the measure of damages, in case of breach of the covenant, is the original debt (*p*).

When nothing has passed.

Where the plaintiff has never got into possession of the land, and in consequence of the want of title never can, the above is clearly the proper measure of damages. The action on the covenant then comes in place of an action for money had and received, on failure of consideration (*q*). But it may be doubted whether the same rule would hold good, as a matter of law, where the plaintiff had got into possession, and in fact continued so still. A case may be easily imagined, and indeed constantly occurs, in which there is such a defect in the title as makes it strictly unsaleable, though there is little or no chance of the occupant ever being turned out. In such a case it would not be fair to allow the whole purchase-money to be recovered. The vendor has not given a saleable title as he engaged; but he has given up his own possessory title, which was worth something to him, and is worth something to the purchaser. It is clear that if he were forced to refund the entire purchase-money, the estate would not revert to him, because, as against him, the title would still be in his vendee. The covenant, it will be observed, is a continuing

(*n*) *Guthrie* v. *Pugsley*, 12 Johnson's Rep. 126.
(*o*) *Bickford* v. *Page*, 2 Mass. 455, 461.
(*p*) 4 Q. B. 395.
(*q*) *Baber* v. *Harris*, 9 A. & E. 532.

one (*r*); and therefore, may be sued upon from time to time, according as fresh damage arises (*s*). The fair rule then would be to give the plaintiff such damages as will compensate him for the defective quality of his title. This was the course adopted in the case last cited, where the special damage laid was, that the lands were thereby of less value to the owner, and that he was hindered from selling them so advantageously. And so in an American case, where it appeared that there was an outstanding paramount title, which the plaintiff had purchased in, having been all the time in possession, it was held that he was not entitled to recover the whole consideration money with interest, but only the amount paid to perfect the title, with interest from the time of payment (*t*). It may be questioned, too, whether interest on the purchase-money ought in any case to be allowed, where the plaintiff has had a beneficial possession. The profits received from the land ought to be assumed to be an equivalent for the outlay of his money (*u*). It would be different where the land had been taken for some use which could produce no return until a distant period, which had not arrived; as, for instance, where the purchase was of building lots or unreclaimed land. Where the plaintiff has always been in possession, and his title has since been perfected, without any expense on his part, nominal damages only can be recovered in the absence of special loss; as, for instance, where the grantor, having conveyed without title, subsequently acquired a title, which was held to enure to the grantee by estoppel (*x*).

Covenant for quiet enjoyment.

A breach of the covenant for quiet enjoyment cannot occur till the plaintiff has actually been dispossessed or otherwise disturbed. Cases of this sort present less difficulty than the preceding in one respect, viz., that the nature of the damages is no longer hypothetical, but ascertained. Where the plaintiff, who was lessee of a term, was evicted, it was held that in

(*r*) *Kingdon* v. *Nottle*, 4 M. & S. 53.

(*s*) *Ante*, p. 62.

(*t*) *Spring* v. *Chase*, 22 Maine, 505; [*Brandt* v. *Foster*, 5 Iowa, 287; *Fawcett* v. *Woods*, *ib.* 400. The vendee cannot, however, swell his damages beyond the amount of the consideration paid to the vendor by purchasing the paramount title; *Cox* v. *Henry*, 32 Penn. 18.]

[(*u*) *Cox* v. *Henry*, 32 Penn. 18.]

(*x*) *Baxter* v. *Bradbury*, 20 Maine, 260. [And see *Nosler* v. *Hunt*, 18 Iowa, 212.]

actions on the covenant for title, or quiet enjoyment, the measure of damage was the value of the unexpired part of the term, and the amount of any damages recovered against the plaintiff by the ejector as mesne profits without interest (*y*). And where an action is brought against the occupier by a person with superior title, and the former compromises by paying money, he is entitled in an action upon the covenant for title to recover the whole sum so paid, and his costs as between attorney and client, even though he gives the covenantor no notice of his intention to compromise. The only effect of want of notice is to let in the party, who is called upon for an indemnity, to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain; and that the defendant might have obtained better terms, if the opportunity had been given him (*z*).

Mode of calculating value of land;

Of course the rule stated above, as to the damages being the value of the unexpired part of the term, would apply equally where the estate was of a nature higher than a chattel interest. If it were held in fee, the damages would be the entire value of the estate. And then arises the question, how is this value to be calculated? Is it to be the value at the time of conveyance, or at the time of eviction? I am not aware of any English case in which a rule has been laid down on this point, but it has formed the subject of frequent discussion in America (*a*).

(*y*) *Williams* v. *Burrell*, 1 C. B. 402. [So where a lessor, being tenant for life, with power to grant leases in possession, granted to a lessee in possession a reversionary lease, which, on the lessor's death, reversioner refused to ratify, the lessee recovered from the lessor's executor the premium which he had paid to the lessor, and the difference in value between the term professed to be granted by the lessor, and that ultimately granted by the reversioner, together with the excess of the costs of the second lease over that of the void lease; *Lock* v. *Furze*, 19 C. B. N. S. 96; 34 L. J. C. P. 201; affirmed in Ex. Ch. L. R. 1 C. P. 441; 35 L. J. C. P. 141.]

(*z*) *Smith* v. *Compton*, 3 B. & Ad. 407. [*Rolph* v. *Crouch*, *ante*, p. 55.]

(*a*) See Sedg. Dam. 160—175. 175 *et seq.* 4th ed.

[In the appendix to the first edition of this treatise the author adds] "In an action for breach of a covenant for quiet enjoyment it appeared that the plaintiff had erected buildings upon the land and converted it into pleasure ground, and he claimed damages for the expense he had incurred in so doing. Dallas, C. J., said, 'I very much doubt whether in any case a plaintiff can recover for the improvements and buildings he may choose to make and erect upon the lands.' The point, however, was not decided; *Lewis* v. *Campbell*, 8 Taunt. 727.

when it has increased.

Land may have obtained an increased value since the time of the conveyance, either from intrinsic circumstances affecting it, or from improvements made upon it by the purchaser. In New York, and some other states, it was early decided that the measure of damages in case of eviction, when the purchaser derived no benefit from the property, owing to the defective title, was the sum paid, with interest from the time of payment, and the costs of ejectment (*b*). Kent, C. J., said, "Upon the sale of lands, the purchaser usually examines the title for himself, and in case of good faith between the parties (and of such cases only I now speak), the seller discloses his proofs and knowledge of the title. The want of title is therefore usually a case of mutual error, and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be, if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser without the hazard of absolute ruin." The same rule was applied in a later decision to the case of improvements made by the owner, for which it was held that no allowance could be made (*c*). And a similar doctrine was laid down where the eviction was from a lease (*d*). These decisions seem to have been founded not only on the arguments from expediency which were advanced, but on the analogy of the old law in the case of a warranty, upon a writ of *warrantia chartæ*. There the rule also was, that the value should be taken at the time of the conveyance, and not at the time it was recovered back from the occupier (*e*). The law of New York upon this point is followed by the states of South Carolina, Virginia, Tennessee, and Kentucky. On the other hand, in Massachusetts and Connecticut, although the purchase-money and interest is held to be the proper measure of damage, in an action on the

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[In a case before Knight Bruce, V. C., in 1850, where a father had settled an estate upon the marriage of his son, and covenanted with the trustees that he was seised in fee, whereas he was but tenant for life, in estimating the damages for the breach of covenant, the value of the estate was taken at the death of the settlor; *Wace* v. *Bickerton*, 3 D. G. & S. 751. See at p. 756.]

(*b*) *Staats* v. *Ten Eyck's Exrs.*, 3 Caines, 111 (*f*).

(*c*) *Pitcher* v. *Livingston*, 4 Johnson's Rep. 1.

(*d*) *Kinney* v. *Watts*, 14 Wend. 38.

(*e*) 6 Ed. II., 187.

covenant for title where there has been no eviction, the Courts have decided that where there has been an eviction, the value of the land is to be estimated as it was at that time (*f*).

I conceive that the doctrine laid down by Kent, C. J., is clearly the equitable rule, where the improvements arise from causes of an entirely collateral nature, such as the growth of a town, the formation of a railway, or the like. The occupier has had all the benefit of this increased value, so long as it lasted, without paying anything for it. Even supposing that he had sold again after the land had risen in value, and been forced to pay back to his purchaser according to that additional value, still he would be only repaying money, which he had actually received, and would on the same principle have a right to call on his vendor to return the sum which he had received, and no more (*g*).

But the same obvious equity seems by no means to exist when the additional value arises from the outlay of the plaintiff's own capital upon the land. No doubt cases might be put in which a claim for damages on this account would be clearly inadmissible; as, for instance, if a person bought a moor or a mountain for shooting over, and chose to reclaim the one, or build a mansion with pleasure grounds upon the other. But suppose he purchased building ground at so much per foot in London or Manchester for the express object of building, ought he not to be repaid for money laid out in this way, the benefit of which is seized by a stranger? In this case, the damage incurred is the direct result of the breach of contract, and a result which must have been contemplated by the party entering into the covenant (*h*). Probably this will be found to be the true ground of distinction, and that every case must be decided upon its own merits, according as the improvements were the fair consequence of the contract of sale or not.

(*f*) *Gore* v. *Brazier*, 3 Mass. 523, 543; *Caswell* v. *Wendell*, 4 Mass. 108; *Horsford* v. *Wright*, Kirby, 3.

[(*g*) But in *Lock* v. *Furze*, *ante*, p. 145, the plaintiff really recovered damages for a rise in the value of the land.]

[(*h*) Accordingly, in equity a purchaser of building land has had allowed to him the amount expended in erecting houses; *Bunny* v. *Hopkinson*, 27 Beav. 565; 29 L. J. Ch. 93. In *Rolph* v. *Crouch*, L. R. 3 Ex. 44; 37 L. J. Ex. 8, the lessee, a florist, recovered the value of his conservatory. And in America, tenants' improvements rendering the land more productive, have been allowed; *Ricketts* v. *Lostetter*, 19 Ind. 125; and the costs of paving in front of building lots; *Hale* v. *City of New Orleans*, 18 Louisiana (Ann.), 321.]

Damages in case of eviction from part of the land.

Where there has been an eviction of part of the land sold, the mode in which damages are to be assessed will vary according as the failure of title takes place as to an undivided share of the land, or to an ascertained portion of it. In the former case, the vendor must refund an aliquot part of the purchase-money, according to the fractional part lost by the purchaser. In the latter case, evidence may be given of the quality of the specific piece from which the plaintiff has been ejected, and the law will apportion the damages to the measure of value between the land lost and the land preserved (*i*). Where the land is only held on lease, and there is a partial eviction by title paramount, the rent will be apportioned (*k*). The damages then ought, according to the principle laid down before (*l*), to be the value of the part evicted for the unexpired portion of the term; that is, the difference between the rent which would have been paid, and the profits which would have been made. Where, however, the eviction is by the lessor himself, or any one claiming through him, there is no apportionment, but a complete suspension of all subsequently accruing rent (*m*). Would this make any difference in the claim for damage?

Deed is conclusive as to amount of purchase-money.

Where the damages are to be calculated upon the basis of the purchase-money, its amount if stated in the deed of conveyance, cannot be contradicted by parol evidence. "Where any consideration is mentioned, if it is not said also, 'and for other considerations,' you cannot enter into any proof of any other: the reason is because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other" (*n*). On the same principle evidence cannot be given that it was really smaller than is stated, or that it was never paid at all (*o*). One case may seem contra-

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(*i*) *Per* Kent, C. J., *Morris* v. *Phelps*, 5 Johnson's Rep. 49, 55. [*Brandt* v. *Foster*, 5 Clarke (Iowa), 287. In one case in America, for the purpose of reducing the damages to a nominal sum, parol evidence was admitted to show that nothing was in fact paid for the specific piece, and that it was included in the conveyance by mistake; *Nutting* v. *Herbert*, 35 New Hamps. 120.]

(*k*) *Smith* v. *Malings*, Cro. Jac. 160; *Stevenson* v. *Lambard*, 2 East, 575; *Boodle* v. *Cambell*, 7 M. & Gr. 386.

(*l*) *Williams* v. *Burrell*, 1 C. B. 402, *ante*, p. 144.

(*m*) *Morrison* v. *Chadwick*, 7 C. B. 266.

(*n*) *Per* Lord Hardwicke, *Peacock* v. *Monk*, 1 Ves. Sen. 128.

(*o*) *Rowntree* v. *Jacob*, 2 Taunt. 141; *Baker* v. *Dewey*, 1 B. & C. 704. [But equity a recital that purchase-money has been paid may be shown to be not

dictory, but is really not so. A deed containing a general release of all debts, recited that the releasee had previously agreed to pay to the releasor the sum of 40*l.*, and that "in consideration of the said sum of 40*l.* being now so paid as hereinbefore is mentioned," and also in consideration of certain other payments to him and J. S., "the receipts of which said several sums they did hereby acknowledge," he the plaintiff releases the defendant from all demands, &c.; the action was for the 40*l.* which it was proved had never been paid. It was held that the words of the deed formed no estoppel, as the general words of the release were qualified by the recital, and that the sentence ought to be read, "In consideration of the sum of 40*l.* being now so agreed to be paid as aforesaid;" while the subsequent words of receipt referred more properly to the payments which were to be made to the releasor and J. S. (*p*).

Covenant for further assurance.

[In the case of a covenant for further assurance the whole value cannot be recovered till the ultimate damage is sustained. And if no damage is suffered in the lifetime of the ancestor, the action must be brought by the heir and not by the executor (*q*).]

Covenant against incumbrances.

The last species of covenant we shall notice under this head is the covenant against incumbrances. There seems to be no difference in principle between a covenant against incumbrances, and a covenant to pay them off. If so, the point is decided in England. The action was by the trustees of the defendant's wife on a covenant to pay off incumbrances to the amount of 19,000*l.* They had paid nothing themselves, and no special damage was laid or proved; it was held that the full amount of the incumbrances might be recovered. Lord Tenterden, C. J., said, "If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value." And Patteson, J., said, "At law the trustees were entitled to have the estate unincumbered; how could that be enforced, unless they could recover the whole amount of the incumbrances in

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true; *Wilson* v. *Keating*, 4 De Gex & J. 588; 27 Beav. 121; 28 L. J. Ch. 895.]

(*p*) *Lampon* v. *Corke*, 5 B. & A. 606.

[(*q*) *King* v. *Jones*, 5 Taunt. 418, 428. The paragraph in the text is printed from the appendix to the first edition of this work.]

an action on the covenant?" (*r*). The rule in America is different. There it is held that the damages are merely nominal, unless the plaintiff has paid something to their discharge (*s*). But that when he has extinguished the incumbrances he is entitled to an indemnity (*t*).

I conceive that the rule laid down by the Court of King's Bench is the true one. The damages are not, as Mr. Sedgwick seems to suppose, given in respect of a future contingent loss. They are the proper compensation for an actual and existing loss. The question is, how much is the value of the estate diminished at the moment by the existence of the incumbrances? If interest has to be paid upon them, there is a clear loss of annual profit; but suppose the interest is provided for elsewhere, and the estate is merely an ultimate security, still the owner is damnified to the full amount of the incumbrances, if he should wish to sell the estate, to mortgage it, to settle it, or to charge portions upon it. True, he may not want to do any of these things at present, but as soon as he does want to do them, he will undoubtedly fail. It is no satisfaction to a man who has to break off a match, for instance, because he cannot effect a settlement, to be told that he may now bring an action, and obtain substantial damages. Nor is it any answer to say that he may himself pay off the incumbrance, and then sue; because very likely he may have no ready money, and be unable to borrow any, on account of the incumbered condition of his estate; in short the American doctrine converts a covenant to pay off incumbrances into a covenant of indemity against incumbrances, which it is apprehended is a very different thing.

Where, however, both present and contingent loss are

(*r*) *Lethbridge* v. *Mytton*, 2 B. & Ad. 772. [The author adds, in his appendix to the first edition, "Where an action is brought on a covenant against incumbrances, and the incumbrance is not necessary but only a contingent one, which may never occur, the damages will be nominal; *Vane* v. *Lord Barnard*, Gilb. Eq. Rep. 7."]

(*s*) *Prescott* v. *Truman*, 4 Mass. 627; [*Grant* v. *Tallman*, 20 N. Y. 191. But where the representation that the property was incumbered was made fraudulently, the amount of the mortgage was recovered; *Haight* v. *Hayt*, 19 N. Y. 464.]

(*t*) *Delavergne* v. *Norris*, 7 Johnson's Rep. 358; *Hall* v. *Dean*, 13 Johnson's Rep. 105. Cases where the grantee has been actually evicted in consequence of the breach of covenant, of course come under different rules. See all the cases, Sedg. Dam. 185—190.

negatived, the damages will obviously be only nominal; for instance, when at the time of trial the incumbrance has ceased to exist, and its removal has caused no expense to the plaintiff (*u*).

Covenant to renew.

[The amount of damage recoverable for a breach of covenant to renew was much discussed in a case in Ireland (*x*). The covenant was treated as not involving a contract that the renewal would confer a good title (*y*), and it followed as a necessary consequence that the value of the renewal, for withholding which damages were to be assessed, depended partly on the value of the land and partly on the title of the lessor. It was considered that if the lessor had no title or estate out of which a valid renewal could have been carved, the lessee lost nothing by the non-renewal, for under such circumstances a renewal would have been valueless (*z*).]

(*u*) *Herrick* v. *Moore*, 19 Maine, 313; [*Smith* v. *Jefts*, 44 New Hamps. 482.]

[(*x*) *Strong* v. *Kean*, 13 Ir. L. R. 93 Ex. Ch.]

[(*y*) *Ib.*, *per* Pigot, C. B., at p. 146.]

[(*z*) *Ib.*, and see *per* Crampton, J., at p. 128.]

CHAPTER VI.

1. *Work and labour.* 2. *Contracts of hiring and service.*

NEXT to contracts of sale, probably the most common species of contract is that by which the labour of others is purchased for a limited time. Agreements of this sort are entered into with a view to the performance of a particular work, or the procuring of a certain amount of service, and the remuneration to the other party resolves itself into the price of the work, or his own wages or salary.

I. As to contracts for work and labour.

This case will be simple enough where the work has been done according to the contract. The measure of damages will be the contract price if any, or the value of the thing, if no price has been fixed. Where the work consists partly of work done under a special contract, and partly of extras added subsequently, the plaintiff may recover for the latter at once, on a *quantum meruit*, even though the time for paying for the work under the agreement has not arrived. And a *quantum meruit* is the only way in which such extras can be sued for, unless there has been a special contract to meet them (*a*). In such an action the original contract must be put in stamped, that it may be seen what work was extra (*b*). Where there has been a contract for a specific work at a settled price, and deviations have been subsequently agreed on, the employer is not liable beyond the amount stipulated, unless he was in-

Extras.

(*a*) *Robson* v. *Godfrey*, 1 Stark. 275. [See as to the effect of special contracts, *Ranger* v. *Great Western Ry. Co.*, 5 H. L. Ca. 72; *Russell* v. *Sa da Bandeira*, 13 C. B. N. S. 149; 32 L. J. C. P. 68; *Stadhard* v. *Lee*, 3 B. & S. 364; 32 L. J. Q. B. 75.]

(*b*) *Buxton* v. *Cornish*, 12 M. & W. 426; but see *Edie* v. *Kingsford*, 14 C. B. 759; 23 L. J. C. P. 123.

formed that the alterations would create additional expense, or must necessarily have known it (*c*). And where the plaintiff has contracted to supply a particular article of certain materials at a stated price, he cannot by making it of superior materials obtain a right to an increased price; nor can he, when it has once been delivered to the defendant, force him to return it on his refusal to pay such a price (*d*). Deviations.

Where the plaintiff was employed to construct a machine, by means of which he was to experiment on the best mode of carrying out defendant's patent, it was held that in an action for work, labour, and materials, he might recover not only the cost of the machine and his own labour, but also for his scientific skill, and the use of other machines necessarily kept idle while the experiments were going on (*e*).

Interest will be recoverable under 3 & 4 W. IV. c. 42 (*f*), but not otherwise.

On the other hand there may be a failure to carry out the contract, either through the plaintiff's default, or the refusal of the defendant to allow him to proceed in it.

Where the contract is to do a specific piece of work, as for instance, to build a house for an entire sum, there can be no claim for payment of any part before the whole is finished (*g*). But where the consideration is apportionable, as when a shipwright agreed to put a ship into thorough repair, and no entire sum has been agreed on, it has been held that the person who is to do the work, may sue for payment as the benefit accrues, and recover *pro tanto* (*h*). *A fortiori* where the consideration is apportioned by the agreement, and a price affixed to each item, as on a contract to deliver straw at the rate of three loads in a fortnight up to the 24th June, at the sum of 33*s*. per load (*i*). It may be observed that the contract with an attorney is an entire one, to carry the suit to its termination, and he cannot recover costs for part of a Claim for payment before entire work has been completed;

(*c*) *Lovelock* v. *King*, 1 M. & Rob. 60.
(*d*) *Wilmot* v. *Smith*, 3 C. & P. 453.
(*e*) *Grafton* v. *Armitage*, 2 C. B. 336; *Bird* v. *M'Gaheg*, 2 C. & K. 707.
(*f*) See *ante*, pp. 110, 111.
(*g*) *Rees* v. *Lines*, 8 C. & P. 126; [*Appleby* v. *Myers*, L. R. 2 C. P. 651; 36 L. J. C. P. 331, in Ex. Ch.]
(*h*) *Roberts* v. *Havelock*, 3 B. & Ad. 404.
(*i*) *Withers* v. *Reynolds*, 2 B. & Ad. 882.

suit which he has abandoned, unless he has given his client reasonable notice (*j*), or can show some satisfactory reason to dispense with such notice (*k*); but if his client refuses to supply him with money, he may, after notice, discontinue the proceedings, and sue for the work done (*l*).

or where it is not in accordance with the contract.

No action can be maintained upon a contract to do a certain thing at a stated price, where the plaintiff has himself failed to perform his part of the agreement. Nor can he recover even for the partial benefit the defendant has received, when the labour was expended upon the defendant's own property so as to be inseparable from it; as, for instance, where the contract was to make three chandeliers complete for 10*l.*; or to cure a flock of sheep, the agreement being that the plaintiff was to be paid nothing unless he cured all, which he did not do (*m*). Here the retention of the benefit accruing from the plaintiff's labour clearly raises no new implied contract to pay for it, and the original contract has been broken. Where, however, the original agreement has not been performed, but the plaintiff has done something which the defendant has accepted and retained, dealing with it in such a manner as to raise an implied contract to pay for it, the plaintiff may recover the value of the partial benefit, not upon the original contract, but upon a *quantum meruit.* In such a case he is only entitled to recover the value of the work done, and the materials supplied (*n*); and the inferiority of the work may be given in evidence in reduction of damages (*o*). No remuneration at all can be recovered, when no benefit has been received. This may happen, either where work which might be useful has been performed unskilfully, or where work which is useless for the object in view has been performed even skilfully (*p*).

Case in which plaintiff may sue on *quantum meruit.*

(*j*) *Harris* v. *Osbourn*, 2 C. & M. 629.
(*k*) *Nicholls* v. *Wilson*, 11 M. & W. 106.
(*l*) *Vansandau* v. *Browne*, 9 Bingh. 402.
(*m*) *Sinclair* v. *Bowles*, 9 B. & C. 92; *Bates* v. *Hudson*, 6 D. & R. 3; [*Munro* v. *Butt*, 8 E. & B. 738.]
(*n*) *Grounsell* v. *Lamb*, 1 M. & W. 352; *Lucas* v. *Godwin*, 3 Bingh. N. C. 737; *Chapel* v. *Hickes*, 2 C. & M. 214.
(*o*) *Basten* v. *Butter*, 7 East, 479; *Cousins* v. *Paddon*, 2 C. M. & R. 547; and see *ante*, p. 71.
(*p*) *Hill* v. *Featherstonhaugh*, 7 Bingh. 569; *Huntley* v. *Bulwer*, 6 Bingh. N. C. 111.

Where a party contracts to do work at a certain price, and his employer afterwards does part of it, or furnishes part of the materials which the former had undertaken to supply, this is matter of reduction of damages, not of set-off (*q*).

There is nothing peculiar in an attorney's claim to recover costs, except the statutory regulations as to delivering a signed bill, and getting them taxed (*r*).

Damages when defendant has prevented performance of contract;

Where the nonperformance of the contract arises, not from any failure on the part of the plaintiff, but from some act of the defendant, who absolutely refuses to perform, or renders himself incapable of performing his share of the contract, the plaintiff may rescind the contract and sue at once, on a *quantum meruit*, for what he has done. This was decided in a case where the plaintiff had been engaged by the defendant to write a treatise on Costume and Ancient Armour, to be published in the Juvenile Library. When a certain progress had been made in the work, the defendants abandoned the publication for which it was intended. The declaration contained a count for work and labour, upon which it was held that the plaintiff might recover on the principle stated above (*s*).

II. As to contracts of hiring.

No difficulty can arise, when the action is for wages earned by virtue of a contract which has been completely performed.

when plaintiff has not completed time of service.

When the contract is to serve for a specified time for a specified sum, the plaintiff cannot recover that sum upon the contract unless he has performed it: nor upon a *quantum meruit*, unless the nonperformance arises from the defendant's act; therefore where a seaman was hired for a certain sum, "provided he proceeds, continues, and does his duty on board for the voyage," and he died before its arrival, it was held that no wages could be claimed either on the contract, or upon a *quantum meruit* (*t*). On the same principle, where a servant

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(*q*) *Turner* v. *Diaper*, 2 M. & G. 241; *Newton* v. *Forster*, 12 M. & W. 772.

(*r*) 6 & 7 Vict. c. 73, s. 37. As to evidence in reduction of damages, see *ante*, p. 69.

(*s*) *Planché* v. *Colburn*, 8 Bingh. 14. [See *Prickett* v. *Badger*, 1 C. B. N. S. 296; 26 L. J. C. P. 33; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C. B. N. S. 733; 34 L. J. C. P. 15.]

(*t*) *Cutter* v. *Powell*, 6 T. R. 320, 2 Sm. L. Ca. 1. [It may be remarked, that the rule by which a seaman's right to wages was made contingent on the earning of freight was done away with by the Merchant Shipping Act, 1854,

is dismissed for misconduct, he cannot recover any wages due to him since the last pay-day (*u*).

Where the service has been determined before the natural time by the wrongful act of the defendant, some questions of nicety arise, both as to the amount that may be recovered, and the mode in which it must be sued for.

Difference between contracts to pay for service, and contracts to employ.

In the first place we may remark that where the contract consists of *independent* covenants or promises, by which, in consideration that A. shall serve B. for so many weeks, &c., B. promises to pay A. so much per week during the specified time, &c., there is no implied covenant that B. shall retain A. in his service during that time. A. may recover payment during the whole time, whether he is allowed to serve or not, provided he is ready and willing, and offers to do so, and is only prevented from doing so by B. But B. is under no obligation either to continue the business for which he engaged him, or to employ him in it. Consequently a declaration alleging as a breach in such a case dismissal from service is bad, and no damages can be recovered in respect of it (*x*).

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17 & 18 Vict. c. 104, s. 83. The rule never extended to the master; *Hawkins* v. *Twizell*, 5 E. & B. 883; 25 L. J. Q. B. 160.]

(*u*) *Ridgway* v. *Hungerford Market Co.*, 3 A. & E. 171. See for instances of such dismissal, *Turner* v. *Robinson*, 5 B. & Ad. 789; *Amor* v. *Fearon*, 9 A. & E. 548; *Gould* v. *Webb*, 4 E. & B. 933. The act need not involve any moral delinquency; *Turner* v. *Mason*, 14 M. & W. 112; *Smith* v. *Thompson*, 8 C. B. 44; [*Horton* v. *M'Murtry*, 29 L. J. Ex. 260; and want of skill to do work undertaken justifies dismissal; *Harmer* v. *Cornelius*, 5 C. B. N. S. 236; 28 L. J. C. P. 85.] It is not necessary for the master to tell the servant the grounds of his dismissal; *Baillie* v. *Kell*, 4 Bingh. N. C. 638; nor even to know them at the time, provided a sufficient ground for dismissal did then exist; *Ridgway* v. *Hungerford Market Co.*, 3 A. & E. 171; *Wiletts* v. *Green*, 3 C. & K. 59; *Spotswood* v. *Barrow*, 5 Exch. 110; though he may by his mode of pleading make his knowledge of the misconduct material, and necessary to be proved; *Mercer* v. *Whall*, 5 Q. B. 447; *Cussons* v. *Skinner*, 11 M. & W. 161. [Disability from temporary sickness will not disentitle a servant to wages, if the contract is treated as subsisting throughout; *Cuckson* v. *Stones*, 1 E. & E. 248; 28 L. J. Q. B. 25. Permanent illness excuses non-performance of a contract for personal service; *Boast* v. *Firth*, L. R. 4 C. P. 1; 38 L. J. C. P. 1. So the death of either master or servant puts an end to the contract in the absence of any stipulation to the contrary; *Farrow* v. *Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326. The premium paid with an apprentice cannot be recovered back if the master dies; *Whincup* v. *Hughes*, L. R. 6 C. P. 78; 40 L. J. C. P. 104.]

(*x*) *Aspdin* v. *Austin*, 5 Q. B. 671; *Dunn* v. *Sayles*, 5 Q. B. 685. See too *Burton* v. *Great Northern Ry.*, 9 Exch. 507. [But these two first-mentioned cases have been much observed upon. See *per* Erle, C. J., *M'Intyre* v. *Belcher*, 14 C. B. N. S. 654, 32 L. J. C. P. 254. Under the particular circumstances of *Aspdin* v. *Austin*, Cockburn, C. J., has subsequently expressed

But the words "agreed," "agreement," are the words of both (*y*), and where they are used, the promise by one party to do a thing, becomes a promise by the other party to permit it to be done (*z*). Therefore where it was agreed between plaintiff and defendants (a public Company), that the plaintiff, as attorney of the Company, should receive a salary of 100*l.* per annum, in lieu of rendering his annual bill of costs, and should for such salary advise the Company in all matters connected with their business, and attend upon them when required, this was held to be an agreement to continue the relation of attorney and client for at least one year, and that an action would lie for dismissal before the year, and that the agent could support an alleged promise to retain and employ. The word "employ," however, merely means to "engage in service," and neither means to supply with work, nor to employ *exclusively*. And the agreement being mutual, not independent, does not amount to a promise to pay after dismissal (*a*).

An agreement to pay a salary of so much per annum is merely a yearly hiring, at so much per annum while the service lasts (*b*).

Remedy for improper dismissal.

Where there is a contract to employ for a defined time, and the servant has been dismissed without just cause, he may sue specially on the contract to employ him: and this action may be commenced at once upon the dismissal (*c*). And where the service is to commence on a future day, and before the arrival of that day, the employer positively renounces the covenant, even without doing anything to incapacitate himself from performing it at the appointed day, the servant may sue at once. And the jury, in assessing the damages, would be justified in looking at all that had happened or was likely to happen,

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an opinion that it was rightly decided. See *Churchward* v. *The Queen*, L. R. 1 Q. B. at p. 191.]

(*y*) *Pordage* v. *Cole*, 1 Wms. Saund. 319 (*l*). [1 Wms. Notes to Saund. 548.]

(*z*) *Elderton* v. *Emmens*, 6 C. B. 160; affirmed in *Dom. Proc.*, 13 C. B. 495; 4 H. L. C. 625; [*M'Intyre* v. *Belcher*, *supra*; *Beeley* v. *Stuart*, 7 H. & N. 753; 31 L. J. Ex. 281; and see *Churchward* v. *The Queen*, L. R. 1 Q. B. 173; and not voluntarily to do anything which will indirectly prevent its being done; *Stirling* v. *Maitland*, 5 B. & S. 840; 34 L. J.Q. B. 1; *Harrington* v. *Churchward*, 29 L. J. Ch. 521. And see *Whittle* v. *Frankland*, 2 B. & S. 49; 31 L. J. M. C. 81.]

(*a*) *Elderton* v. *Emmens*, *ubi sup.*

(*b*) *Ibid.*, 175.

(*c*) *Pagani* v. *Gandolfi*, 2 C. & P. 370.

to increase or mitigate the loss of the plaintiff down to the day of trial (*d*). By bringing this action the plaintiff treats the covenant to hire as still existing, and may recover damages upon it for the period of service up to dismissal; and therefore if the jury do not give damages for such time, he cannot bring indebitatus assumpsit afterwards (*e*).

Contract does not subsist for any collateral purpose.

In such a case, however, though the contract is treated as subsisting for the purpose of suing upon it, it cannot be taken to subsist for any ulterior or collateral purpose. The plaintiff was engaged to superintend mines in America for three years, with a stipulation that he should not be dismissed without a year's notice, or a year's salary, and that if he stayed at the mines three years, he should have the expenses of his family defrayed on their return. He was dismissed in eighteen months after his arrival, without either a year's notice or salary. It was held, that although the contract had not been determined, in the only mode agreed on, it could not be considered as subsisting for the whole time originally contemplated, so as to entitle him to his third year's salary, and the expenses of his family on their return (*f*).

Measure of damages.

The measure of damages in this action is the actual loss incurred, which may be much less than the wages for the unexpired period of service, where another employment may be easily obtained (*g*). Where, on a yearly hiring, the plaintiff is dismissed before the termination of the engagement, he is generally given his salary up to the end of the current year (*h*). Where the contract was for two years, with a fixed salary and half profits, and the plaintiff was dismissed at the end of four months and a half, the jury gave him a year's salary, and his share of the profits for twelve months, which was held not to be excessive (*i*). [No allowance can be made in the nature of

(*d*) *Hochster* v. *De Latour*, 2 E. & B. 678. [And see *Frost* v. *Knight*, L. R. 7 Ex. 111; 41 L. J. Ex. 78, in Ex. Ch.]

(*e*) *Goodman* v. *Pocock*, 15 Q. B. 576.

(*f*) *French* v. *Brookes*, 6 Bingh. 354.

(*g*) *Elderton* v. *Emmens*, 6 C. B. 178; *Goodman* v. *Pocock*, 15 Q. B. 583, *per* Erle, J.

(*h*) *Beeston* v. *Collyer*, 4 Bingh. 309; *Down* v. *Pinto*, 9 Exch. 327.

(*i*) *Smith* v. *Thompson*, 8 C. B. 44. [In winding up companies the compensation to managers engaged for a term has been calculated upon the principle of ascertaining the present value of an annuity of a sum equal to the full salary for the unexpired term, having regard to the risk to health and life and making a deduction for the liberty of obtaining fresh appointments; *Yelland's case*, L. R. 4 Eq. 350; *Ex parte Clark*, L. R. 7 Eq. 550.]

pretium affectionis, nor any reference to any pain that might be felt by the plaintiff, on the ground that he was attached to the place (*k*).]

A right of action for this cause passes to assignees in bankruptcy, since the injury to the personal estate is the primary and substantial cause of action (*l*).

On the other hand, the plaintiff may treat the contract as rescinded, and *sue at once* for the time he has actually served. In this form of action he cannot recover anything more than wages for such time (*m*). And under non-assumpsit, the defendant may give in evidence the worthlessness of his services, and the jury may give damages accordingly (*n*).

Doctrine of constructive service.

It has been held that a servant improperly dismissed in the middle of his time, might wait till the period had expired, and then sue in *indebitatus assumpsit*, for the whole period, on the doctrine of constructive service (*o*). That doctrine, however, after being severely commented upon in *Smith* v. *Hayward* (*p*), seems to have been tacitly overruled by the Exchequer Chamber in *Elderton* v. *Emmens* (*q*), and expressly by Patteson, J., and Erle, J., in *Goodman* v. *Pocock* (*r*). The two alternatives previously mentioned are therefore the only ones open.

Menial servants.

In the case of menial servants, usage has established the right to dismiss them at any time, by giving them a month's notice or a month's wages (*s*). A head-gardener, living within the demesne, at a salary of 100*l.* a-year, was held to be a menial within this rule (*t*), [and a huntsman, though hired at yearly wages, and with the right to receive perquisites which could not be fully received till the end of the year (*u*);]

[(*k*) *Per* Erle, C. J., *Beckham* v. *Drake*, 2 H. L. Ca. 607. This passage in the text is printed from the appendix to the first edition of this work.]

(*l*) *Drake* v. *Beckham*, 11 M. & W. 315; 2 H. L. Ca. 579; reversing *Beckham* v. *Drake*, 8 M. & W. 846.

(*m*) *Archard* v. *Hornor*, 3 C. & P. 349; *Smith* v. *Hayward*, 7 A. & E. 544; *Broxham* v. *Wagstaffe*, 5 Jur. 845.

(*n*) *Baillie* v. *Kell*, 4 Bingh. N. C. 638.

(*o*) *Gandell* v. *Pontigny*, 4 Camp. 375; *Collins* v. *Price*, 5 Bingh. 132; *Smith* v. *Kingsford*, 3 Sco. 279.

(*p*) 7 A. & E. 544.

(*q*) 6 C. B. 160, 178.

(*r*) 15 Q. B. 576.

(*s*) *Broxham* v. *Wagstaffe*, 5 Jur. 845.

(*t*) *Nowlan* v. *Ablett*, 2 C. M. & R. 54.

[(*u*) *Nicoll* v. *Greaves*, 17 C. B. N. S. 27; 33 L. J. C. P. 259.]

but not a warehouseman (*x*), nor a clerk (*y*), nor a governess (*z*).

Actions for dismissing without due notice.

Where a menial, or other person, whose service is of this nature, viz., determinable by a month's notice or wages, is dismissed without either, the declaration must be special, for not giving notice (*a*). This, however, is quite different from the case of a contract to employ for a specific time, and a breach of it by improper dismissal. In the latter case, as we have seen (*b*), the declaration must be for breach of the entire agreement to hire, and damages must be given, not only for the time which has been served, but for that which has not. But in the former case, the declaration is only for breach of the particular point as to notice. The damages for this are liquidated, viz., one month's wages (*c*); and the plaintiff may either recover in a separate count, or a separate action, for the bygone service (*d*).

Salary now apportionable by statute.

[By the Apportionment Act, 1870 (33 & 34 Vict. c. 35,) salaries have been made apportionable (*e*).]

(*x*) *Fawcett* v. *Cash*, 5 B. & Ad. 904.

(*y*) [*Fairman* v. *Oakford*, 5 H. & N. 635; 29 L. J. Ex. 459;] *Beeston* v. *Collyer*, 4 Bingh 309.

(*z*) *Todd* v. *Kerrich*, 8 Exch. 151; 22 L. J. Ex. 1.

(*a*) *Fewings* v. *Tisdal*, 1 Exch. 295; overruling *Eardley* v. *Price*, 2 B. & P. N. R. 333.

(*b*) *Ante*, p. 157.

(*c*) *Fewings* v. *Tindal*; *French* v. *Brookes*, 6 Bingh. 354.

(*d*) *Hartley* v. *Harman*, 11 A. & E. 798; affirmed *Goodman* v. *Pocock*, 15 Q. B. 580.

[(*e*) See sections 1 & 2, cited at length, *post*, p. 186. By s. 5, the word "annuities" includes salaries and pensions. Salaries had been held not to come within the Apportionment Act, 4 & 5 Will. IV. c. 22, s. 2; *Lowndes* v. *Earl of Stamford and Warrington*, 18 Q. B. 425; 21 L. J. Q. B. 371.]

CHAPTER VII.

DEBT.

Damages in debt nominal in general.

THE damages in an action of debt are in general merely nominal for its detention (*a*), though the jury may give substantial damages if they think fit (*b*). In some cases, however, the damages for detention may form a very important part of the claim; as, for instance, in debt on a mortgage deed, where the principal and interest are to be paid on a given day, the interest after that day can only be recovered as damages. Accordingly a plea which only answers the debt, and not the damages, is bad (*c*); but if it professes to be an answer to "the causes of action," it will be sufficient, even though pleaded to particular special counts, while the damages are laid as a separate sum at the end of the declaration. For each count must be read with so much of the damages as are applicable to it (*d*).

Interest.

We have seen in what cases interest is given as a matter of law (*e*). And by 3 & 4 W. IV. c. 42, s. 28, upon all debts payable at a certain time or otherwise, the jury may, if they think fit, give the current interest as damages from the time of payment, if payable by written agreement at a certain time; if otherwise, then from demand of payment in writing, if notice is given that interest would be claimed (*f*).

Where a plaintiff has actually received payment of the debt,

(*a*) *Wilde* v. *Clarkson*, 6 T. R. 304.
(*b*) *Per* Lord Abinger, C. B., *Henry* v. *Earl*, 8 M. & W. 233.
(*c*) *Lowe* v. *Steele*, 15 M. & W. 380; [*Ash* v. *Pouppeville*, L. R. 3 Q. B. 86; 37 L. J. Q. B. 55.]
(*d*) *Gell* v. *Burgess*, 7 C. B. 16.
(*e*) *Ante*, p. 105.
(*f*) See *ante*, p. 111.

Action cannot be commenced for nominal damages in debt.

he cannot commence an action for nominal damages (*g*). If the plaintiff means to demand further damages as interest, he ought not to receive the principal (*h*). But when he has commenced an action, if the debt is paid during the course of it, he may proceed for nominal damages to entitle him to costs (*i*). And in such a case the verdict should be entered for the whole sum due and paid since action brought, with 1*s*. damages, and if execution is issued for more than the 1*s*. damages and costs, the defendant's course is to apply to the Court for relief (*j*).

Case where payment since action brought.

But where the payment has been made after action, and the plaintiff has either waived or accepted damages for its detention, he can have no further claim for damages, and cannot proceed for costs, which only arise out of damages. An action was brought on a cheque for 25*l*. Defendant after action commenced paid the amount, and offered 1*l*. for expenses, which plaintiff refused, saying he would pay them himself. Held that the jury was right in entering verdict for defendant when action was continued (*k*). Lord Denman seems to put this on the ground that after the debt was paid, the plaintiff could not proceed for merely nominal damages. This, however, is contrary to *Nosotti* v. *Page*. It would seem that the real ground of the decision was, that the sum was accepted in satisfaction, not only of the debt, but of all damages and costs arising from its detention, as will be seen from the argument and observations of Erle, J. (*l*). Consequently, there were no damages to proceed for.

Action for 20*l*. for use and occupation: pleas, 1st, except as to 12*l*., *nunquam indebitatus;* 2nd, as to 11*l*. parcel of the 12*l*., in bar of further maintenance, payment of 11*l*., after writ and before declaration, in satisfaction thereof and all causes of action in respect thereof; 3rd, as to 1*l*. payment into court. Plaintiff joined issue on 1st and 2nd pleas, and took money

(*g*) *Beaumont* v. *Greathead*, 2 C. B. 494; [and see, *per* Willes, J., *Tetley* v. *Wanless*, L. R. 2 Ex. at p. 280; 36 L. J. Ex. at p. 156; in Ex. Ch.]

(*h*) *Dixon* v. *Parkes*, 1 Esp. 110.

[(*i*) *Nosotti* v. *Page*, 10 C. B. 643; *Goodwin* v. *Cremer*, 18 Q. B. 757; *Kemp* v. *Balls*, 10 Ex. 607.]

(*j*) *Nosotti* v. *Page*, 10 C. B. 643.

(*k*) *Thame* v. *Boast*, 12 Q. B. 808.

(*l*) *Ib.*, at p. 813; [and in *Goodwin* v. *Cremer*, 18 Q. B., at p. 761. See also as to its being a question of fact whether the payment is made on account of the debt only, or of debt and damages, *per* Willes, J., in *Tetley* v. *Wanless*, L. R. 2 Ex. at p. 280; 36 L. J. Ex. at p. 156 in Ex. Ch.]

out of court on 3rd. It appeared on trial that the debt had never exceeded 12*l.*, and that after the writ had issued, but before plaintiff or defendant knew of it, plaintiff received the 11*l.* mentioned in 2nd plea. Plaintiff contended, that as he did not know that costs had been incurred, he could not have received the 11*l.* in satisfaction of the causes of action, one of which was the costs to which he was not aware that he was entitled. The judge directed 1*s.* damages to be entered. Held wrong. As to 1st plea, the verdict plainly ought to be entered for the defendant. As to 2nd, the evidence proved that he had accepted 11*l.* in satisfaction of *it*. And as to the costs arising from the action to recover it, these were exactly the same costs as the plaintiff was entitled to recover on taking the money out of court. Consequently, no more damages could be recovered under the 2nd count than those which were actually paid for under the 3rd count. Verdict was entered on the general issue for defendant; damages were struck out, and postea to defendant (*m*). This decision seems to have gone on the ground that the only damage caused by the detention of the 11*l.* was the cost of suing for it. If so, as such cost was received by the plaintiff on the 3rd plea (*n*), the damage was exhausted, and there was no further cause of action. But it seems pretty clear that there was a nominal damage caused by the detention, for which, when the action *had once commenced*, the plaintiff could continue it (*o*), unless this damage had itself been satisfied by the payment of 11*l.*, as in *Thame* v. *Boast*. This was quite distinct from the costs of suit. Perhaps, however, the explanation is, that such nominal damage is only a fiction, maintained to enable the plaintiff to get his costs; and as these were provided for under the 3rd count, the result of maintaining the fiction would have been to give him the costs of carrying out an action beyond its necessary limits.

In a later case the action was for goods sold. Plea, except as to 22*l.* 8*s.* 3*d.* never indebted, and as to that sum payment after action brought of 22*l.* 8*s.* 3*d.* to the plaintiff, who accepted it in satisfaction of the said claim of 22*l.* 8*s.* 3*d.*, and of

(*m*) *Horner* v. *Denham*, 12 Q. B. 813, n.
(*n*) *Rumbelow* v. *Whalley*, 16 Q. B. 397.
(*o*) *Nosotti* v. *Page*, 10 C. B. 643.

all damages accrued in respect thereof. At the trial the plaintiff offered no evidence on the first issue, and defendant proved payment of the sum alleged to the plaintiff, who accepted it, no mention being made of costs. The judge was of opinion that the plaintiff ought to have confessed the plea, and taken his costs under Reg. Gen. T. T. 1853, pl. 22, and ordered a verdict for the defendant, with leave to move to enter nominal damages. The Court held, that the plaintiff was entitled to judgment in his favour, for that the plea was not proved, unless the defendant showed, either that the plaintiff consented to accept the 22*l.* 8*s.* 3*d.* in satisfaction of the debt, damages, and costs, or that the costs were paid. Bramwell, B., said, "With respect to the 22nd Pl. rule, I will only add that it never could have been the intention of its framers that the rule should alter the law, and make a plea true which was not so before, but only that a plaintiff might have an opportunity of confessing a plea containing matter of defence arising after action brought. The case of *Beaumont* v. *Greathead*, merely amounts to this, that nominal damages are inappreciable when they do not increase the actual claim. In the case of *Thame* v. *Boast*, all that the Court decided was, that, in point of fact, the money was paid and received in satisfaction of both debt and damages, and the question was not discussed whether it could be a satisfaction in point of law" (*q*). It is curious that *Horner* v. *Denham* was not cited on either side, as it seems exactly in point. There the Court seem to have thought, as the judge did here, that as all the costs incurred by the plaintiff at the time the payment was made, were offered to him by the plea, he had no right to go on, unless he claimed something more than merely these costs. This certainly seems justice; whether it is law is another matter (*r*).

(*q*) *Cook* v. *Hopewell*, 11 Exch. 555, 559.

[(*r*) The paragraph in the text is printed from the appendix to the first edition of this work.

In *Tetley* v. *Wanless*, *post*, p. 165, a difficulty was raised in argument which does not appear to have been felt by Wightman, J., who tried *Cook* v. *Hopewell*, viz., that the rule in question, (Rule 22, Trin. Term, 1853,) in terms only applies to cases where a plea containing a defence arising after the commencement of the action is pleaded, together with pleas of defences arising before the commencement of the action. The rule does not in terms provide that a plaintiff may confess such a plea, and thereupon be entitled to his costs up to the time of pleading, when such a plea is pleaded alone. No judgment was given upon this point.]

Release after action brought.

[In a recent case in an action of debt, the defendant pleaded to the further maintenance of the action a composition deed executed by a statutory majority of his creditors under the Bankruptcy Act, 1861, containing a release of "all actions, suits, debts, claims, or demands," which the creditors had or had had against the defendant, and an acceptance of the stipulated composition in full satisfaction of the several sums of money owing to them. The action was commenced before the execution of the deed. A verdict having been entered for the defendant, and a rule to enter it for the plaintiff and for judgment *non obstante veredicto* having been discharged by the Court of Exchequer, it was argued in the Exchequer Chamber that the effect of a release after action brought of a debt which was the cause of action was only to discharge the debt itself, subject to the creditor's right to go on with the action to obtain a judgment for nominal damages to which judgment the law would annex costs. The Court of Exchequer Chamber gave judgment for the defendant, considering that the release being of all "actions, suits, debts, claims, or demands," the debt and action were both gone (*s*).]

Tender.

As a plea of tender alleges that the defendant has been ready to pay at all times, if the plea is found for the defendant, the plaintiff cannot obtain any damages, because there has been no detention of the debt (*t*).

Penalty.

As to damages in debt for a penalty given by statute, see *ante*, p. 2.

Liquidated damages.

As to the cases in which a penalty may be recovered as liquidated damages, see *ante*, p. 99.

Provisions of Statute 8 & 9 W. III. c. 11.

In debt upon a bond for performance of covenants, conditions, &c., the plaintiff formerly not only had judgment, but was entitled to take out execution for the whole penalty, together with his costs, without any regard to the amount of damage he had suffered (*u*).

But now by 8 and 9 W. III. c. 11, s. 8, it is enacted, that

[(*s*) *Tetley* v. *Wanless*, L. R. 2 Ex. 21; 36 L. J. Ex. 25; affirmed, L. R. 2 Ex. 275; 36 L. J. Ex. 153. The plea was, in the first instance, pleaded in bar, but the Court of Exchequer amended it by making it a plea to the further maintenance of the action.]

(*t*) *Cutlers' Company* v. *Hursler*, Comb. 224; 1 W. Saund. 33 *d*; [1 Wms. Notes to Saund. 42.]

(*u*) 1 W. Saund. 57, n. 1; [1 Wms. Notes to Saund. 67, n. 1.]

in all actions in any court of record upon any bond, or on any penal sum, for non-performance of any covenants or agreements, contained in any indenture, deed or writing, the plaintiff may assign as many breaches as he shall think fit; and the jury shall assess not only such damages and costs as were theretofore usually done, but also damages for such of the breaches as the plaintiff shall prove to have been broken, and the like judgment shall be entered on such verdict as theretofore was usually done. And if judgment shall be given for the plaintiff on demurrer, or by confession, or nil dicit, the plaintiff may suggest on the roll as many breaches as he shall think fit, which shall be inquired into by a jury summoned to appear before the sheriff (*x*). After the damages assessed and costs have been satisfied, either before or after execution, a stay of execution is to be entered on the record; but the judgment shall notwithstanding remain as a further security for future breaches. This statute is compulsory in all cases to which it applies. Therefore when the plaintiff has judgment on verdict, or on demurrer, or by default, he must have the damages assessed by a jury, otherwise the verdict in the former case will be erroneous, and a venire de novo awarded; or in the latter case, the execution will be set aside (*y*).

Statute is compulsory.

How judgment to be entered.

"The like judgment," however, "shall be entered on such verdict as heretofore hath been done." Therefore, at the trial, the jury must find a verdict for the plaintiff with 1*s*. damages and 40*s*. costs, as before. And the judgment is to recover the debt, *i. e.*, the penalty, and 1*s*. damages, for detention, and 40*s*. costs; together with the costs of increase, which include of course the costs of trial (*z*).

Where breaches are assigned, whether in the declaration or in the replication, the jury who try the cause may assess the

(*x*) 3 & 4 W. IV. c. 42, s. 16.

(*y*) *Drage* v. *Brand*, 2 Wils. 377; *Hardy* v. *Bern*, 5 T. R. 540, 636; *Roles* v. *Rosewell*, 5 T. R. 538; *Walcot* v. *Goulding*, 8 T. R. 126; overruling *Walker* v. *Priestley*, Com. Rep. 376; *Dry* v. *Bond*, Bull N. P. 164. [The provisions of the statute cannot be waived by agreement between the parties; *Montgomery* v. *Byrne*, 2 Ir. C. L. R. 230.]

(*z*) 1 W. Saund. 58, *d*; [1 Wms. Notes to Saund. 75. The writ of execution, if sued out, must be for the entire penalty, damages, and costs; but it must be indorsed to levy only the damages assessed for the breaches, the costs found by the jury, and the costs of increase, and the costs of execution. If the damages assessed and the charge of execution exceed the penalty of the bond, the execution must be only for the amount of the penalty and costs of increase. 1 W. Saund. 58 *e*; 1 Wms. Notes to Saund. 77; 1 Chitty's Arch. Pr. 611, 12th ed.]

damages without a special venire ad inquirendum. But where they are suggested, a special venire is necessary (*a*).

Mode of suing for breach of covenant.

The plaintiff may choose any of the following alternatives in suing. He may state the condition of the bond in his declaration, and assign several breaches under the statute.

He may declare on the bond generally. In this case, if defendant suffer judgment by confession or nil dicit, or the plaintiff have judgment on demurrer, breaches may be suggested.

Or the defendant may plead to the declaration. If his plea be one to which the plaintiff might reply at common law, without assigning breaches, as non est factum, covin, he may do so, and enter a distinct and separate suggestion of breaches under the statute, whether before or after judgment (*b*); but he cannot join an issue to a plea, and a fresh suggestion in the same replication (*c*).

If the defendant plead so as that the plaintiff must have assigned a breach at common law, e. g. general performance, the plaintiff must assign breaches still, but may by virtue of the statute assign several (*d*).

Where the plaintiff does not assign damages at first, and the defendant, setting out the conditions, pleads performance to part and an excuse for the residue; "then as to the part of the condition as to which performance is pleaded, the plaintiff may assign one or more breaches: but as to the part of which performance is not pleaded, but is excused, there must be a suggestion; or if the matter of excuse is traversed, then there must be no assignment but a suggestion of breaches, the truth of which, without any issue, must be tried with a view to ascertain the amount of damages if the issue on the traverse is found for the plaintiff, otherwise not" (*e*).

To what cases the statute extends.

This statute extends to all bonds and deeds for the performance of covenants, or payment of money, which are of a divisible nature, and capable of only a partial breach; or from the viola-

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(*a*) *Parkins* v. *Hawkshaw*, 2 St. 381; *Quin* v. *King*, 1 M. & W. 42; *Scott* v. *Staley*, 4 B. N. C. 724.

(*b*) *Ethersey* v. *Jackson*, 8 T. R. 255; *Homfray* v. *Rigby*, 5 M. & S. 60.

(*c*) *De La Rue* v. *Stewart*, 2 B. & P. N. R. 362.

(*d*) *Plomer* v. *Ross*, 5 Taunt. 386.

(*e*) Parke, B., *Webb* v. *James*, 8 M. & W. 645, 658. See 2 W. Saund. 187, *a*, *et seq.*

tion of which, only part of the damage guarded against may arise. It includes, therefore, bonds for the payment of money by instalments (*f*); for the payment of an annuity (*g*); for the performance of an award (*h*); and where a bond is conditioned for the payment of a single sum, and also for the performance of other covenants, breaches must be assigned, though the action is merely brought to recover the single sum, for which purpose it is like a common money bond (*i*): for in all such cases, as the plaintiff would have been entitled at law to issue execution to the full amount of his judgment, the defendant would have been forced to an expensive remedy in equity.

And it applies equally whether the covenants, &c., are contained in the same deed or writing, or in a different one (*k*).

When it does not apply.

The statute does not extend to bail-bonds (*l*), nor replevin bonds (*m*), because the Court can give such relief as a Court of Equity could, and the form of the bond ascertains the value of the thing which it is taken to secure (*n*); nor to actions by assignee of a bond, given to the Lord Chancellor by a petitioning creditor, on suing out a commission of bankruptcy, because he has authority himself to assess damages upon it (*o*); nor to money-bonds for payment of a sum certain at a day certain, against which the Court can relieve on payment of the money due, by 4 Ann. c. 16, s. 13 (*p*); nor to post obit bonds (*q*); nor to bonds for payment of interest and principal, where both have become due (*r*), even though the money became payable in consequence of certain provisions in an indenture of even date, *provided* that by the course of pleading the jury have

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(*f*) *Willoughby* v. *Swinton*, 6 East, 550; [*Harrington* v. *Coxe*, 3 Ir. C. L. 87.]

(*g*) *Walcot* v. *Goulding*, 8 T. R. 126; [*Ryan* v. *Massy*, 2 Ir. C. L. 642.]

(*h*) *Welch* v. *Ireland*, 6 East, 613.

(*i*) *Quin* v. *King*, 1 M. & W. 42.

(*k*) 1 W. Saund. 58, n. 1; [1 Wms. Notes to Saund. 68.]

(*l*) *Moody* v. *Pheasant*, 2 B. & P. 446.

(*m*) *Middleton* v. *Bryan*, 3 M. & S. 155.

(*n*) *Ibid.*; 10 Bingh. 131, Tindal, C. J. [See now as to replevin bonds, 19 & 20 Vict. c. 108, ss. 63, *seqq.*, the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 22, and the County Court Rules, 1867, 259, *seqq.*]

(*o*) *Smithey* v. *Edmonson*, 3 East, 22; *Smith* v. *Broomhead*, 7 T. R. 300.

(*p*) *Murray* v. *E. of Stair*, 2 B. & C. 90, 92. [Under the C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 25, by leave of a judge, money may be paid into court in an action on a money bond.]

(*q*) *Ibid.*; *Cardozo* v. *Hardy*, 2 B. Moore, 220.

(*r*) *Smith* v. *Bond*, 10 Bingh. 125.

found that the money had become payable (*s*); nor to bonds for payment of principal and interest, with proviso that on default in paying the interest, the whole amount of principal and interest should become due (*t*). But where the bond is for payment of principal on a future day, and interest in the meantime, and the bond becomes forfeited before the day by a default in the interest, the statute applies (*u*). It does not extend to judgment entered upon a warrant of attorney to secure a sum by instalments; though the Court, if necessary, would direct an issue to inquire whether the instalments had been paid (*x*); or to secure an annuity (*y*); because in such a case, if execution were issued for more than the arrears due, "the Court would have set it aside, or in case of any mistake have referred it to their officer, or if necessary to a jury, to say for what sum the execution ought to stand" (*z*). And the rule is the same where the warrant of attorney is collateral security for a bond for the same purpose (*a*). But where a bond was nominally absolute for payment of a particular sum, but by indenture of same date reciting the bond, it was agreed that it should stand as security for all sums of money which then were, or might afterwards become, due from the obligor of the bond; this was held to be a mere evasion of the statute, and that an assignment of breaches was necessary (*b*).

It is not necessary for the Crown to assign breaches under this statute, and if any one breach is proved it is entitled to judgment (*c*).

No more than amount of penalty and costs can be recovered on a bond.

On the whole current of authorities, it appears that no more than the amount of the penalty and costs can be recovered on a bond; because the penalty ascertains the damages by consent of the parties (*d*); and upon payment of the penalty and costs the Court will order satisfaction to be acknowledged (*e*).

(*s*) *Ibid.*; *Darbishire* v. *Butler*, 5 B. Moore, 198.
(*t*) *James* v. *Thomas*, 5 B. & Ad. 40.
(*u*) *Tighe* v. *Crafter*, 2 Taunt. 387; *Vansandau* v. ——, 1 B. & A. 214.
(*x*) *Cox* v. *Rodbard*, 3 Taunt. 74; *Kinnersley* v. *Mussen*, 5 Taunt. 264.
(*y*) *Shaw* v. *Marq. Worcester*, 6 Bingh. 385.
(*z*) Tindal, C. J., *ibid.* 389.
(*a*) *Austerbury* v. *Morgan*, 2 Taunt. 195.
(*b*) *Hurst* v. *Jennings*, 5 B. & C. 650.
(*c*) *Per* Alexander, C. B., *R.* v. *Peto*, 1 Y. & J. 171.
(*d*) *White* v. *Sealy*, Dougl. 49.
(*e*) *Ibid.*; *Brangwin* v. *Perrot*, 2 W. Bl. 1190; *Wilde* v. *Clarkson*, 6 T. R. 303; overruling *Lord Lonsdale* v. *Church*, 2 T. R. 388; *Clarke* v. *Seton*, 5

Where the debt and the penalty were the same sum, and the bond was stated to be for the payment of the debt with lawful interest, Littledale, J., ruled that interest might be given beyond the penalty, as damages for the detention, on the ground that it was expressly provided that the debt should bear interest (*f*). Here the express agreement negatived the presumption that the parties intended to fix the penalty as the amount of ultimate damage to be recovered.

When plaintiff is not forced to sue for penalty.

But where the penalty is contained in any other instrument than a bond, it is optional for the plaintiff, either to sue in debt for the penalty, or to proceed upon the contract, and recover more or less than the penalty, *toties quoties* (*g*); and accordingly greater damages than the amount of the penalty have been recovered in actions on charter-party (*h*).

Of course where the sum named is not a penalty but liquidated damages, the statute does not apply. In such a case the amount is not discretionary. It is of the substance of the agreement; a jury cannot assess damages where the parties themselves have fixed them (*i*).

Value of sum in foreign currency.

Where an action is brought in England, to recover the value of a given sum in a foreign currency, upon a judgment obtained abroad, the value is that sum in sterling money which the currency would have produced, according to the rate of exchange between the foreign country and England at the date of the former judgment (*k*).

Ves. 415; *M'Clure* v. *Dunkin*, 1 East, 436—8; *Hellen* v. *Ardley*, 3 C. & P. 12.

(*f*) *Francis* v. *Wilson*, Ry. & M. 105.

(*g*) *Per* Lord Mansfield, *Lowe* v. *Peers*, 4 Burr. 2228.

(*h*) *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East, 343; *Maylam* v. *Norris*, 2 D. & L. 829.

(*i*) *Lowe* v. *Peers*, 4 Burr. 2229; *Barton* v. *Glover*, Holt, N. P. C. 43; *ante*, p. 97—99; 1 W. Saund. 58 *c*; [1 Wms. Notes to Saund. 74.]

(*k*) *Scott* v. *Bevan*, 2 B. & Ad. 78.

CHAPTER VIII.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Interest on bills of exchange.

INTEREST is, by usage, always allowed upon bills of exchange and promissory notes (*a*). But where it is not expressly reserved, it is not part of the debt, but merely damages for its detention, and the jury are not bound to give it unless they think proper. But negligence or default on the part of the holder, seem to be the only grounds which will justify the jury in withholding it (*b*). Interest ought not to be allowed on a bill or note for any time that it has been in the hands of an alien enemy (*c*).

The mode in which the interest is to be calculated varies according as it is expressly reserved, or given as damages.

From what time it is calculated.

Where interest is expressly reserved, it is calculated from the date of the instrument (*d*), whether the promise is general or to pay interest on demand (*e*). And even where no action could originally have been maintained upon the note, as having been given to a married woman by her husband and two others as sureties for him, it was held that she might recover within six years after the death of her husband, and obtain interest from the date (*f*). And similarly, where the promise was by the maker of the note for himself and executors, one year after his own death to pay 300*l.* with legal interest. In this case no previous dealings between the parties were shown; but, in

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(*a*) *Ante*, p. 105.
(*b*) *Du Belloix* v. *Lord Waterpark*, 1 D. & R. 16; *Cameron* v. *Smith*, 2 B. & A. 308; *Laing* v. *Stone*, 2 M. & R. 561; [*Keene* v. *Keene*, 3 C. B. N. S. 144; 27 L. J. C. P. 89.]
(*c*) *Du Belloix* v. *Waterpark*, *ubi sup.*
(*d*) *Kennerly* v. *Nash*, 1 Stark. 453.
(*e*) *Hopper* v. *Richmond*, 1 Stark. 508.
(*f*) *Richards* v. *Richards*, 2 B. & Ad. 447.

the absence of proof, it was presumed that the note was given for value. Had the evidence proved the contrary, so as to render the note a voluntary gift, in the nature of a legacy, it appears the interest would have been held to run from the maker's death (*g*).

Where interest is not specially reserved, it runs from the maturity of the bill or note (*h*), and in case of an instrument payable on demand, from the time of demand. The commencement of the action is a sufficient demand for this purpose (*i*).

But it is different where there is neither a person competent to sue for the money, nor authorised to receive it. Therefore where a bill, upon which interest was not expressly reserved, became due after the death of an intestate, and before administration, it was held that interest ran, not from the maturity of the bill, but from demand by the administrator (*k*).

Liability of drawer or endorser to pay interest.

It has been held that the drawer or endorser of a bill, not bearing interest on the face of it, is only liable for interest from the time he receives notice of dishonour (*l*). But this decision seems contrary to principle, as the contract by drawer and endorsers is, that the acceptor shall pay at maturity, or that they will. Any damage suffered by his default ought to be borne by them. Accordingly, it is held that a person who guarantees a bill, must pay interest upon it from the time it is due (*m*). There is one case in which the plaintiff, in an action against the endorser, was given interest from the time of dishonour by non-acceptance (*n*). It does not appear, however, whether any interval had elapsed between the dishonour and notice to the defendant. It may be observed that the further principle laid down in *Walker* v. *Barnes*, viz., that the drawer was entitled to a reasonable time to pay after notice of dishonour, has been expressly overruled by a much later case (*o*). This is so far important to the present point, as showing that

(*g*) *Roffey* v. *Greenwell*, 10 A. & E. 222.
(*h*) *Gantt* v. *Mackenzie*, 3 Camp. 51.
(*i*) *Pierce* v. *Fothergill*, 2 Bingh. N. C. 167. [A demand may sometimes be dispensed with where it would be a useless formality; *Re East of England Banking Co.*, L. R 6 Eq. 368.]
(*k*) *Murray* v. *East India Co.*, 5 B. & A. 204.
(*l*) *Walker* v. *Barnes*, 5 Taunt. 240.
(*m*) *Ackermann* v. *Ehrensperger*, 16 M. & W. 99.
(*n*) *Harrison* v. *Dickson*, 3 Camp. 52 n.
(*o*) *Siggers* v. *Lewis*, 1 C. M. & R. 370.

the responsibility of the drawer or endorser was considered to be much less identical with that of the acceptor in those days than now.

When payment by instalments.

Where a note is payable by instalments, and on failure of any instalment the whole is to become due, the interest is to be calculated upon the whole amount remaining due after any default, and not upon the respective instalments at the time when they would otherwise have been payable (*p*).

Tender; payment into court.

Interest does not run after a tender (*q*); but when money is paid into court upon an instrument which bears interest, the sum must cover interest down to the date of payment into court, and not merely to the commencement of the action, or the plaintiff may proceed for the difference (*r*). In all other cases interest is carried down to final judgment (*s*).

Production of bill.

Where the defendant by his pleading admits the bill, the plaintiff cannot recover interest from its maturity at the date alleged in the declaration without producing the bill (*t*). Where there has been a judgment by default, it appears to have been held that the note need not be produced before the Master upon a rule to compute (*u*).

Rate of interest.

Interest is calculated at the current rate of the place, according to whose laws it is payable. It is for the jury to say what the rate of interest in the particular place is, but it is for the judge to direct them as to the place according to whose laws the interest is to be assessed (*x*). Bills and notes in England bear interest at the rate of 5*l.* per cent., both at law and in equity (*y*).

According to *lex loci solutionis.*

The place at which each party to a bill or note undertakes that *he himself* will pay it, is with regard to him the *lex loci contractûs*, according to which his liability is governed (*z*). Consequently, with regard to each of the parties to a bill, interest in the nature of damages, where there has been no

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(*p*) *Blake* v. *Lawrence*, 4 Esp. 147.
(*q*) *Dent* v. *Dunn*, 3 Camp. 296.
(*r*) *Kidd* v. *Walker*, 2 B. & Ad. 705.
(*s*) *Robinson* v. *Bland*, 2 Burr. 1081.
(*t*) *Hutton* v. *Ward*, 15 Q. B. 26.
(*u*) *Davis* v. *Barker*, 3 C. B. 606; and now in such a case, judgment by default is final, 15 & 16 Vict. c. 76, s. 93.
(*x*) *Gibbs* v. *Fremont*, 9 Exch. 25.
(*y*) *Upton* v. *Ferrers*, 5 Ves. 803.
(*z*) Story, Confl. Laws, s. 315.

In actions against acceptor,

express contract, may be of a very different amount. Where a bill was drawn, endorsed, and accepted in France, but payable in England, it was held in an action against the acceptor, that he was only liable for the English rate of interest (*a*).

Drawer,

But if the action had been against the drawer, upon default of the acceptor, his liability to interest would have been regulated by the rate of interest in France. "The drawer, by his contract, undertakes that the drawee shall accept, and shall afterwards pay the bill according to its tenor. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for the payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with such interest, damages, and costs as the law of the country where he contracted may allow" (*b*).

Or endorser.

When, however, a bill has been drawn at A., and endorsed at B., and the action is against the endorser, it is a question whether this endorsement is a new drawing of a bill at B., or only a new drawing of the same bill, that is, a bill expressly made at A. In the former case it would carry interest at the rate at B.; in the latter, at A. (*c*). There is a difference upon this point. Pardessus adopts the latter opinion (*d*). He says, "L'obligation de dommages-intérêts fait partie de la convention intervenue entre le tireur et le preneur, et chaque endosseur s'est porté caution d'exécuter l'engagement du premier. Chacun d'eux peut donc, dans l'espèce présentée, être contraint de payer tous les dommages-intérêts auxquels le défaut d'acquittement de la dette peut donner lieu." The weight of authority in England, however, is certainly in favour of the other view. Lord Langdale, M.R., in the case previously cited (*e*), says, "At the time when there is a breach of the contract of the acceptor by non-payment in the country where payment is contracted to be made, there may be a contemporaneous breach of contract by the drawer or endorser in the country where the contract was entered into—where the bill was drawn

(*a*) *Cooper* v. *Waldegrave*, 2 Beav. 282.
(*b*) *Per* Hon. Pemberton Leigh, *Allen* v. *Kemble*, 6 Moo. P. C. 314, 321; *Cougan* v. *Bankes*, Chitty, Bills, 9th ed., 683; *Gibbs* v. *Fremont*, 9 Exch. 25.
(*c*) *Per* Alderson, B., 9 Exch. 31.
(*d*) Cours de Droit Com. Art. 1500.
(*e*) *Cooper* v. *Waldegrave*, 2 Beav. 282, 285.

and the endorsement made,—and the consequences of that breach of contract might be governed by the law of the country where it takes place." Here his Honour places drawer and endorser as each liable on the same principle, viz., according to the law of the place where *their* contract was made. These words are relied on by Mr. T. Pemberton Leigh in *Allen* v. *Kemble* (*f*). And no difference is taken between the cases. As the latter decision settled the liability of the drawer, according to the opinion first quoted, it may be fairly argued that the liability of the endorser would have been similarly settled, if the question had arisen. The high authority of Mr. J. Story is also marshalled on the same side (*g*).

Where interest is expressly reserved.

Where interest at a particular rate is expressly reserved upon the face of the instrument, it becomes of course part of the debt, and the drawer and every endorser is liable to pay this exact amount, wherever his own contract was made. It is not an additional damage accruing from his own breach of contract, but an integral part of the sum which he has contracted to ensure. Interest may, however, be expressly reserved, without any mention of the rate. It such cases, the rule is laid down by Mr. Chancellor Kent (*h*), and by Mr. J. Story (*i*) as follows. "The law of the place where the contract is made is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on lands in another state, unless there be circumstances to show that the parties had in view the law of the latter place in respect to interest. When that is the case, the rate of interest of the place of payment is to govern."

The circumstances which utterly vitiate a bill, such as fraud, immorality, and illegality, of course do not come within our object (*k*). But as the bill may be a perfectly fair and legal transaction, and yet the holder have no right to recover

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(*f*) 6 Moo. P. C. 322.

(*g*) Story, Confl. L. s. 315. [See further, *Hirschfeld* v. *Smith*, L. R. 1 C. P. 340; 35 L. J. C. P. 177; *Lebel* v. *Tucker*, 8 B. & S. 830; L. R. 3 Q. B. 77; 37 L. J. Q. B. 46.]

(*h*) 2 Kent Com. 460, 461.

(*i*) Confl. Laws, s. 305.

(*k*) See Byles, Bills, 5th ed., 95—105; [10th ed. 131—145.]

at all, or only a part of the sum named in it, the question of consideration becomes important.

Effect of want of consideration.

As between immediate parties to the instrument, such as drawer and acceptor, endorser and his endorsee, the rule is very simple. An original absence of consideration (*l*), or an entire failure of consideration (*m*), will be an entire bar to the action. And a partial absence, or failure, of consideration will be a bar pro tanto (*n*).

"But between remote parties, for example, between payee and acceptor, between endorsee and acceptor, between endorsee and remote endorser, two distinct considerations at least must come in question: first, that which the defendant received for his liability; and secondly, that which the plaintiff gave for his title. An action between remote parties will not fail, unless there be an absence or failure of both these considerations. And if any intermediate holder between the defendant and plaintiff gave value for the bill, that intervening consideration will sustain the plaintiff's title" (*o*). Nor is it any defence in an action by endorsee for value against the acceptor, or any other person who has received no consideration, that the plaintiff took with notice of that fact (*p*); unless the endorsement to the plaintiff amounted to a fraud upon the defendant, of which the plaintiff at the time was aware (*q*). And the same rule prevails, though it was indorsed to him after due (*r*). But where the bill is an accommodation bill, and known to be so by the endorsee, he can only recover on it the amount he has actually paid on it (*s*); though if he were ignorant of that fact, he might recover the whole amount, although he had not paid so much (*t*).

(*l*) *Holliday* v. *Atkinson*, 5 B. & C. 501; *Southall v. Rigg*, 11 C. B. 481; *Crofts* v. *Beale*, 11 C. B. 172.

(*m*) *Wells* v. *Hopkins*, 5 M. & W. 7; *Solly* v. *Hinde*, 2 C. & M. 516.

(*n*) *Darnell* v. *Williams*, 2 Stark. 166; *Barber* v. *Backhouse*, Peake, 86; *Simpson* v. *Clarke*, 2 C. M. & R. 342.

(*o*) Byles, Bills, 5th ed., 92; *Robinson* v. *Reynolds*, 2 Q. B. 196; *Collins* v. *Martin*, 1 B. & P. 651; *Hunter* v. *Wilson*, 4 Exch. 489.

(*p*) *Fentum* v. *Pocock*, 5 Taunt. 192; *Manley* v. *Boycot*, 2 E. & B. 46.

(*q*) *Evans* v. *Kymer*, 1 B. & Ad. 528.

(*r*) *Sturtevant* v. *Ford*, 4 M. & G. 101; *Stein* v. *Yglesias*, 1 C. M. & R. 565; *Lazarus* v. *Cowie*, 3 Q. B. 459.

(*s*) *Jones* v. *Hibbert*, 2 Stark. 304.

(*t*) *Wiffen* v. *Roberts*, 1 Esp. 261.

Effect of failure of consideration.

With regard to failure of consideration, three things are to be observed: 1st, that if the consideration for which the bill was given is once executed, no subsequent tortious act by which the defendant is deprived of the benefit of that consideration, can be a defence to the bill.

Therefore where the plaintiff had agreed to execute a lease of premises to the defendant, and the defendant had accepted a bill for the consideration money, and been let into possession, it was decided to be no answer to an action upon the bill, that the plaintiff had refused to execute the lease (*u*). And the same decision took place where the bill was given for the price of goods, which the plaintiff, who was the vendor, had forcibly retaken in two months after delivery (*x*). In each case the only remedy was by cross action against the plaintiff.

2nd. That where the bill is given in pursuance of an agreement to pay money on a particular day, such agreement being absolute and not dependent upon the execution of the consideration; the non-performance of the latter is no defence to an action on the bill, while the contract remains open and unrescinded. An action was brought upon a note for 200*l.* There was an agreement of the same date with the note, by which it appeared that in consideration of 200*l.* then paid or secured to them by the defendant, and in consideration of 1140*l.* to be paid on the 2nd February, the plaintiffs agreed to convey to the defendant an estate subject to two mortgages. The estate was not conveyed owing to a dispute with the mortgagee, who refused to assign his interest; Held that the action on the note was maintainable. Lord Tenterden, C. J., put the decision on the ground that by the agreement the purchase-money was to be paid on the 2nd February in any event. Parke, J., inclined to think that the action would not have been maintainable, if the circumstances had been such that the defendant, having paid the 200*l.* as a deposit, would have been entitled to recover it back. This he could not do as long as the contract remained open. But that was the case here, for the plaintiffs agreed only to convey the estate subject

(*u*) *Moggridge* v. *Jones*, 14 East, 486.
(*x*) *Stephens* v. *Wilkinson*, 2 B. & Ad. 320; and see *Grant* v. *Welchman*, 16 East, 207.

to the two mortgages. They were never bound to convey the legal estate to the plaintiff, but only the equity of redemption; and that they never had refused to convey (*y*).

3. A bill of exchange cannot be accepted on a *quantum meruit* (*z*); and where a bill or note is given for the price of goods, evidence of inferior quality is never admissible in reduction of the claim (*a*). But it is otherwise where the inferiority of the article arises from fraud on the part of the seller; this makes the bill bad *ab initio* (*b*). It would appear then, that though a partial absence of consideration may be set up (*c*), a partial failure of consideration never can, but must always be matter of cross action.

Re-exchange.

For an explanation of re-exchange on dishonoured bills, see Byles, Bills (*d*). The drawer of the bill is liable to re-exchange, no matter how many the hands through which the bill has been returned, and on which the exchange charges have been accumulating, because, by making himself liable for the acceptor, he makes himself liable for all the consequences of the acceptor's default (*e*). And the same rule holds as to an endorser (*f*). But the acceptor is not liable on this account, as his contract is only to pay the sum specified in the bill, and legal interest, according to the rate of the country where it is due (*g*). Where, however, the maker of a note made it "payable in Paris, or at the choice of the bearer, in Dover or London, according to the course of exchange upon Paris," and shortly after all direct exchange ceased between London and Paris, though a circuitous course of exchange was maintained through Hamburg; Held that the

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(*y*) *Spiller* v. *Westlake*, 2 B. & Ad. 155.

(*z*) Lord Ellenborough, 2 Camp. 347.

(*a*) *Ibid.*; *Morgan* v. *Richardson*, 1 Camp. 40 n.; *Fleming* v. *Simpson*, *ibid.*; *Trickey* v. *Larne*, 6 M. & W. 278; [*Cripps* v. *Smith*, 3 Ir. L. R. 277]; the ruling of Tindal, C. J., in *De Scwhanberg* v. *Buchanan*, 5 C. & P. 345, upon this point seems incorrect.

(*b*) *Lewis* v. *Cosgrave*, 2 Taunt. 2; *Solomon* v. *Turner*, 1 Stark. 51.

(*c*) *Wiffen* v. *Roberts*, 1 Esp. 261; *Jones* v. *Hibbert*, 2 Stark. 304.

(*d*) 5th ed., 312. [10th ed., 412. And as to the inadmissibility of evidence of an alleged custom among London merchants, giving to the holder an election between the re-exchange and the amount given for the bill, *Suse* v. *Pompe*, 8 C. B. N. S. 538; 30 L. J. C. P. 75.]

(*e*) *Mellish* v. *Simeon*, 2 H. Bl. 378.

(*f*) *Auriol* v. *Thomas*, 2 T. R. 52.

(*g*) *Napier* v. *Shneider*, 12 East, 420; *Woolsey* v. *Crawford*, 2 Camp. 445.

plaintiff was entitled to recover upon the note, according to the system of circuitous exchange existing at the time the note was presented for payment (*h*).

Protest in case of foreign

In the case of a foreign bill of exchange, a protest for non-acceptance is necessary by the custom of merchants, to charge the drawer (*i*); but it may be dispensed with under those circumstances which render notice of dishonour unnecessary (*k*). Protesting inland bills is unknown to the Common Law (*l*); but St. 9 & 10 W. III. c. 17, authorises the protesting for non-payment of all inland bills for the amount of 5*l.* or upwards, drawn payable at any time after date; and 3 & 4 Ann. c. 9, s. 4, authorises a protest of the same bills for non-acceptance, for which protest there shall be paid 2*s.* and no more. And 2 & 3 W. IV. c. 98, allows the protesting for non-payment of all bills of exchange, which are made payable at any place, other than the place named as the residence of the drawee. No bills can be protested except such as come within the words of the statutes, and a bill payable so many days after sight is not within stat. W. III., and no expenses of protesting can be recovered upon it (*m*). It has been thought that the stat. of 3 & 4 Ann. c. 9, which places promissory notes on the same footing for all practical purposes as bills, authorises protest (*n*). It certainly does not do so in terms, and if they were included, it is strange no mention should be made of them in 2 & 3 W. IV., c. 98. Since it has been decided that interest may be recovered on an inland bill without protest (*o*), the practice has become quite useless.

And inland bills.

Noting and postage.

Expenses of noting and postage, incurred on the return of an inland bill, must be specially laid (*p*); and it is doubtful

(*h*) *Pollard* v. *Herries*, 3 B. & P. 335.
(*i*) *Gale* v. *Walsh*, 5 T. R. 239; *Orr* v. *Maginnis*, 7 East, 359.
(*k*) *Rogers* v. *Stephens*, 2 T. R. 713; as to these circumstances see *Bickerdike* v. *Bollman*, 2 Sm. L. C. 22. [6th ed., 45.]
(*l*) Byles, Bills, 5th ed., 193 [10th ed., 259]; *Leftley* v. *Mills*, 4 T. R. 173.
(*m*) *Leftley* v. *Mills*, 4 T. R. 170.
(*n*) Byles, Bills, 193. [10th ed., 259.]
(*o*) *Windle* v. *Andrews*, 2 B. & A. 696.
(*p*) *Hobbs* v. *Christmas*, Byles, Bills, 192 [10th ed. 258]; *Kendrick* v. *Lomax*, 2 C. & J. 405. [Under the Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67, s. 5, the holder of a dishonoured bill or note has the same remedies for expenses of noting as for the amount of the bill or note.]

whether a charge for noting is in any case recoverable on an inland bill that has not been protested (*q*).

Cost of former action.

A party to a bill, who has been sued upon it, cannot recover the costs of the suit, in an action against the party who is liable to him (*r*).

Liability of transferor who does not endorse.

A party to a bill, who transfers it without endorsement, does not warrant the solvency of the parties to it (*s*), and no action can be maintained against him, if it is dishonoured. He does, however, warrant it to be such a bill as it purports to be. Therefore if it is forged (*t*); or if, professing to be a foreign, it is really an inland bill, and therefore void for want of a stamp, the transferor must refund the amount received, though he was ignorant of the defect, and though the bill would have been paid, notwithstanding the defect, only for the bankruptcy of the acceptor (*u*), or the laches of the holder (*x*).

(*q*) *Kendrick* v. *Lomax*, *ibid.*, *ubi sup.*
(*r*) See *ante*, pp. 46, 47.
(*s*) *Fenn* v. *Harrison*, 3 T. R. 757.
(*t*) *Jones* v. *Ryde*, 5 Taunt. 488.
(*u*) *Gompertz* v. *Bartlett*, 2 E. & B. 849.
(*x*) *Wilson* v. *Vysar*, 4 Taunt. 288.

CHAPTER IX.

1. *Actions for Rent.*
2. *Actions on Covenant to Repair.*
3. *Actions on Covenant to Build or Mine.*
4. *Actions on Covenant to pay Renewal Fine.*
5. *Actions on Covenant to Insure.*
6. *Actions on Covenant to pay Rates.*
7. *Actions on Covenant to deliver up possession.*
8. *Actions on Covenant not to assign.*

In a previous chapter I examined contracts relating to the purchase or sale of land, and the damages which might arise from their breach. In the present chapter I propose to collect together those contracts which relate to the terms on which it is to be held. The most universal and important of these is the contract for payment of rent. Others, such as covenants to repair, present important matter for consideration also. Covenants for title, quiet enjoyment, and against incumbrances, have been discussed before (*a*), as referring rather to the nature of the thing parted with, than the manner in which it was to be occupied.

Actions for rent.

Rent is generally a fixed sum, reserved by a written instrument. In this case difficulty can seldom arise, as the jury have merely to give a verdict for the amount claimed for arrears, and interest upon it from the time due (*b*). Where there was a lease of coal mines to the defendant, yielding, and paying yearly for every ton of coal that should be worked, raised, or got in each year, not exceeding 13,000 tons in any year, 8*d.* per ton, or yielding and paying that amount of money, viz. 433*l.* 6*s.* 8*d.* each year as fixed rent, whether the coal should be worked or not, and also 9*d.* per ton for each ton over and above that quantity; it was held that the whole rent was payable, though the mine was so exhausted that the lessee

(*a*) *Ante*, pp. 142—151. (*b*) 3 & 4 W. IV. c. 42, s. 28.

could not raise 13,000 tons of coal in a year (*c*). The only two cases which ever admit of conflicting evidence as to the amount to be received are, where the rent is claimed in an action for use and occupation, and where a right to an apportionment is set up.

Use and occupation.

1. Debt for use and occupation lay even at common law, although there had been a demise at a fixed rent, provided it could be treated as a mere agreement, and not a lease (*d*). But by 11 Geo. II. c. 19, s. 14, it is lawful for a landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, &c. held or occupied by the defendant, in an action on the case for the use and occupation of what is so held or enjoyed; and if in evidence any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be non-suited, but may make use thereof as evidence of the quantum of the damages to be recovered.

Where there is an agreement.

Where there has been an agreement settling the amount of rent, of course the case is clear, and such agreement may be proved for this purpose, though void as a lease by the Statute of Frauds (*e*). Such an agreement, however, is only evidence of the amount of rent to be paid, where the lessee has enjoyed under it. And where the lessee took under an agreement which he never signed, and the lessor failed to fulfil the agreement, in the principal point which had induced the lessee to propose becoming a party to it, the Court held that he could scarcely be said to have so enjoyed. Accordingly, the jury were at liberty to find any such value, as they considered that which he had enjoyed to be worth (*f*). Even payment of rent

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(*c*) *Bute* v. *Thompson*, 13 M. & W. 487; *R.* v. *Bedworth*, 8 East, 387; [*Jervis* v. *Tomkinson*, 1 H. & N. 195; 26 L. J. Ex. 41. In an action recently brought for breach of a covenant to dig an annual amount of not less than 1000 tons of potter's clay, an equitable plea that there was no clay, and therefore performance was impossible, was held good, the covenant not being considered to amount to a stipulation for a minimum rent in any event; *Lord Clifford* v. *Watts*, L. R. 5 C. P. 577; 40 L. J. C. P. 36. Equity will not relieve a tenant from his liability to pay rent after premises have been burnt down, even though the landlord have received funds from an insurance office, and refused to rebuild; *Lofft* v. *Denis*, 1 E. & E. 474; 28 L. J. Q. B. 168.]

(*d*) *Gibson* v. *Kirk*, 1 Q. B. 850.

(*e*) *De Medina* v. *Polson*, Holt, 47.

(*f*) *Tomlinson* v. *Day*, 2 B. & B. 680; *Swatman* v. *Ambler*, 8 Exch. 72.

at a particular rate is only evidence of an agreement, and will not be conclusive, where any facts show that such rate was not intended to be permanent. A tenant was let into possession of land during the currency of a term, the rent then being 47*l.*, with an agreement that at the end of the term he was to pay 80*l.* He paid the 47*l.*, but disputes arising on the new agreement, it was abandoned, and he continued to occupy. It was held that the jury were to consider what was a fair rent for the continued holding, and that no necessary inference could be drawn from the former holding at 47*l.* (*g*).

Value of premises may be increased by extrinsic circumstances.

The question as to the value of the premises is of course one entirely for the jury. Some light may be thrown upon the principles which should guide them in cases of difficulty, by reference to cases decided under the acts for assessing to the poor rates. It has been held for this purpose, that lands and houses are rateable, not only with reference to what may be regarded as their present intrinsic value, but to any circumstance which for the time increases the beneficial interest of the party who enjoys them. Thus, where a small plot of ground was rendered valuable by a mineral spring, and the buildings upon it derived a profitable character from that circumstance, the lands and buildings were held to be rateable with the spring, at the profits which they produced in association (*h*). So where any right is attached to the possession of a tenement, as a soke mill, which is entitled to the sole multure of all the corn and grain in the neighbourhood, or a canteen in a barracks, which naturally attracts all the custom of the soldiers and their followers (*i*). And so where machinery is demised along with the tenement, whether that machinery be real or personal property (*k*). Of course there is this difference between the rules to be observed in assessing for poor rate, and assessing for rent; that in the former case, the entire value of the tenements and their adjuncts is to be taken into consideration, whether such additional value has been conferred upon them by the act of the tenant himself or not; but for the purpose of ascertaining

(*g*) *Thetford (Mayor of)* v. *Tyler*, 8 Q. B. 95.
(*h*) *R.* v. *Miller*, Cowp. 619.
(*i*) *R.* v. *Bradford*, 4 M. & S. 317.
(*k*) *R.* v. *St. Nicholas, Gloucester*, Caldec. 262; *R.* v. *Hogg*, 1 T. R. 721; *R.* v. *Guest*, 7 A. & E. 951; *Reg.* v. *Haslam*, 17 Q. B. 220; [*Reg.* v. *Lee*, L. R. 1 Q. B. 241.]

the rent due to the landlord, only such value as has been received at the time of the demise can be taken into account. Otherwise the tenant would be paying a rent upon the outlay of his own capital. But although the value of lands or tenements consists not only in the land itself, but also in those things which have been attached, so as to become part of it, the case is different where the increased value arises from a contract by the landlord, to do something which will be beneficial to the occupier. For instance, to supply a public-house with ale at fixed prices, or to provide a tenant with horses to be used on or off the tenement as a moving power, or with steam for the like purpose. The compensation for the power can in neither case form a part of the value of the subject of the occupation (*l*). This is clearly a matter quite independent of the demise, and in respect of which either party may maintain an action on the contract.

Beneficial contract with landlord not part of value of premises.

Annual value, how estimated.

The annual value is properly estimated at the rent which a tenant would give, he paying the poor rates and the expenses of repairs, and the other annual expenses for making the subject of occupation productive; if the subject of occupation be of a perishable nature, or require an annual expense to secure its existence, an allowance ought to be made on that account. It is on this principle that buildings, machinery, canals, gasworks, &c. are rated at a less proportion than arable or other land (*m*).

Period for which plaintiff can recover.

Where the tenant has not come into possession under the plaintiff, the latter can only recover for the time during which he himself has had a legal title, although he may have had the equitable estate, as assignee of the equity of redemption long before (*n*).

Rent in general cannot be apportioned.

2. The general principle of law is, that there can be no apportionment of rent, except by the assent of the parties, either in respect of a portion of the time, or a portion of the

(*l*) *Per* Parke, B., *Robinson* v. *Learoyd*, 7 M. & W. 48; [*Sunderland Parish* v. *Sunderland Union*, 34 L. J. M. C. 121.]

(*m*) *R.* v. *Lower Mitton*, 9 B. & C. 810; *Reg.* v. *Cambridge Gas Light Co.*, 8 A. & E. 73; *R.* v. *Adames*, 4 B. & Ad. 61. [An allowance should be made for ground-rent if paid by the occupier; *Barber* v. *Brown*, 1 C. B. N. S. 121; 26 L. J. C. P. 41, and for the annual repairs of perishable farm-buildings and machinery, and in respect of their contingent or future renewal or reconstruction when past repair; *R.* v. *Wells*, L. R. 2 Q. B. 542.]

(*n*) *Cobb* v. *Carpenter*, 2 Camp. 13, n.

property. Therefore where there has been a surrender or an eviction in the middle of the period for which rent is payable, the landlord cannot recover rateably for the shorter period during which the tenant was in possession (*o*). Nor can he recover any part of the rent, where he has himself evicted the tenant from part of the land; but where there has been a surrender of part of the land, or the lessor has entered upon part for a forfeiture, or by special condition for entry, or the lessee be evicted from part of the land by title paramount, the rent shall be apportioned (*p*). And so, where the reversion is severed by a grant of part of the premises, the rent-service incident to the reversion shall be apportioned (*q*). Possession by a tenant, who has been let in by the lessor under a lease of prior date, and still in existence, is an eviction by superior title, such as would create an apportionment of rent in favour of a subsequent lessee. But where such lease lasts for the entire term over which the subsequent lease was to extend, the lease is utterly void as to that part, and the rent is not apportionable, and no distress can be maintained for it (*r*). No action will lie for use and occupation of a part, where there has been an eviction of another part by the lessor (*s*).

When rent may be apportioned at common law.

Various statutory provisions have passed, to remedy the evil which arose on the determination of leases, by a death in the middle of the current half-year. In such cases the rent for the fractional period was wholly lost. The party who made the lease, or his representatives, could not recover, because the rent was never due; and the person next entitled could not recover, because the tenant had never been in possession of his land. By the joint operation of 11 Geo. II. c. 19, s. 15, and 4 W. IV. c. 22, s. 1, in all cases in which a lease determines on the death of the lessor (although not strictly tenant for life), or on the death of the life during which the lessor was entitled, the representatives of the lessor in the former case, or the lessor himself in the latter may recover a rateable portion of the rent growing due.

Apportionment by statute.

(*o*) *Walls* v. *Atcheson*, 3 Bingh. 462; *Hall* v. *Burgess*, 5 B. & C. 332.
(*p*) Co. Lit. 148, a; 3 Rep. 22.
(*q*) Co. Lit. 148, a; 13 Rep. 57, a.
(*r*) *Neale* v. *Mackenzie*, 1 M. & W. 747.
(*s*) *Reeve* v. *Bird*, 1 C. M. & R. 36; overruling *Stokes* v. *Cooper*, 3 Camp. 514, n., *contra*. As to pleading eviction, see 1 Wms. Saund. 204, n. 2. [1 Wms. Notes to Saund. 209, n. 2.]

The next section of the last-named Act (*t*), provided that in case of any rent-service reserved on a lease, made subsequent to 16 June, 1834, by a tenant in fee or for life, or person demising under a power, and also, in case of all other rents and fixed periodical payments of any description, payable under any instrument executed, or (in case of a will) coming into operation after the same date, there shall be an apportionment thereof on the death of any person interested in such rents, &c., or on the determination, by any other means whatsoever, of the interest of such person, so that he or his representatives shall be entitled to a proportion according to the period since the last payment.

Apportionment Act, 1870.

[The relief given by these Acts has been extended by the recent Apportionment Act, 1870, 33 & 34 Vict. c. 35. Section 1 enacts, that all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. And by section 2, the apportioned part of any such rent, annuity, dividend, or other payment, shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part shall form part, shall be-

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[(*t*) 4 & 5 W. IV. c. 22, s. 2. This act was held only to apply to cases in which the interest of the person interested in rents and payments was determined by his death or by the death of another person; but not to allow an apportionment to be made between the real and personal representatives of a tenant in fee; *Browne* v. *Amyot*, 3 Hare, 173; *Beer* v. *Beer*, 12 C. B. 60; 21 L. J. C. P. 124; *Ex parte Clulow*, 3 K. & J. 689; 26 L. & J. Ch. 513. Seemingly it applied only to the death of the party entitled to the rent in whose favour it was to be apportioned, not to the death of the party bound to pay. The Court of Queen's Bench expressed a strong opinion that no apportionment could take place where the tenancy had been put an end to by the act of the landlord; *Oldershaw* v. *Holt*, 12 A. & E. 590. In no case did the statute apply to payments which were not due under some instrument in writing; *Re Markby*, 4 My. & Cr. 484; *Cattley* v. *Arnold*, 1 Johns. & H. 651; 28 L. J. Ch. 352. It was held to apply to suits arising out of leases made after the passing of the Act, but by virtue of powers contained in settlements or wills executed or coming into operation previous to that date. See *Lock* v. *De Burgh*, 4 De G. & Sm. 470; 20 L. J. Ch. 384; *Plummer* v. *Whiteley*, Johns. 585; 29 L. J. Ch. 247; though in *Fletcher* v. *Moore*, 26 L. J. Ch. 530, an opinion to the contrary was expressed by Kindersley, V. C. See further as to the operation of this Act, *St. Aubyn* v. *St. Aubyn*, 30 L. J. Ch. 917; 1 Drew. & Sm. 611; *Mills* v. *Trumper*, L. R. 1 Eq. 671; and as to annuities, *Trimmer* v. *Danby*, 23 L. J. Ch. 979; *Robinson* v. *Robinson*, 2 Ir. C. L. R. 370.]

come due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.]

The legislature, with its usual anxiety to support the interests of landlords, has also enacted some provisions with a view to secure the recovery of their premises, when the period of tenancy has expired.

Tenant holding over after notice to quit given by himself.

By 11 Geo. II. c. 19, s. 18, if any tenant shall give notice of his intention to quit the premises holden by him, at a time therein mentioned, and shall not deliver up possession at such time, he shall pay double the rent which he should otherwise have paid, and so during his continuance in possession.

Notice by the tenant under this statute may be by word of mouth (*u*). But it must state such an ascertained time as would bind the landlord, and enable him to get another tenant. Accordingly where the notice was that he would leave when he got another situation, which he did get, this was held insufficient (*v*). And on the same principle of reciprocity, the notice must be given by a tenant competent to determine his tenancy, and at the proper distance of time necessary to make such a notice valid. Therefore, where a tenant, who could determine his holding by a six months' notice, gave a shorter one, and then held over, the landlord was not allowed to distrain for double rent (*x*).

Holding over after notice by landlord.

The 4th Geo. II. c. 28, s. 1, provides, that whenever any tenant, or person coming into possession of land under a tenant, shall wilfully hold over after the end of the term, and after notice *in writing* for delivering up possession from his landlord or lessor, or the person to whom the remainder or reversion shall belong, he shall pay double the yearly value of the premises. This statute, being a penal one, is to be strictly interpreted. Where the defendant was tenant of a room in a mill, through which the revolving shaft of a steam-engine passed, it was ruled that in calculating the double value, the

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(*u*) *Timmins* v. *Rowlinson*, 3 Burr. 1603. [The analogous Irish Act, 15 Geo. II. c. 8, s. 9 (Ir.), required written notice; *Farrel* v. *Donnelly*, 4 Ir. L. R. 476.]

(*v*) *Farrance* v. *Elkington*, 2 Camp. 591.

(*x*) *Johnstone* v. *Hudlestone*, 4 B. & C. 922.

value of the power of the steam-engine, which was supplied by the landlord to turn the machinery by means of this shaft, could not be taken into consideration. The Court said that although the rent paid was an entire sum, part of it was paid, not for the value of the occupation, but for the landlord's performance of a contract to do something beneficial to the tenant. If the landlord, by means of the tenant having held over, is prevented from using the steam-power beneficially, and deprived of profit thereby, he has a remedy on his contract with the tenant to give up at the end of the term, or for a trespass in continuing to occupy, and may recover compensation for his loss by way of special damage (*y*).

This statute, it will be observed, requires the notice to be in writing (*z*).

[The action for double value must be brought by the person standing in the position of landlord or lessor. It cannot, therefore, be brought by a person to whom the landlord has granted a fresh lease to commence from the expiration of the former lease, and who is prevented from coming into possession (*a*). The holding over must be contumacious, and not under a *bonâ fide* though mistaken claim of right (*b*).]

Deduction on account of payments made by the tenant.

The landlord's claim to rent is always liable to be reduced by the amount of any payment necessarily made by the tenant, in liquidation of a charge upon the land, or a debt due from the landlord. Of this nature are payments made in respect of ground-rent to the superior landlord (*c*); interest due upon a mortgage prior to the lease (*d*); an annuity charged upon the land (*e*); property-tax (*f*); land-tax and paving-rates (*g*). And it makes no difference that the landlord was not really liable to the tax in question, if by his own laches in not estab-

(*y*) *Robinson* v. *Learoyd*, 7 M. & W. 48.

(*z*) See as to the requisites of such a notice, *Page* v. *More*, 15 Q. B. 684.

[(*a*) *Blatchford* v. *Cole*, 5 C. B. N. S. 514; 28 L. J. C. P. 140. See as to the landlord's right to recover from the old lessee the costs of an action brought against him by the new lessee, *ante*, p. 55.]

[(*b*) *Swinfen* v. *Bacon*, 6 H. & N. 184, 846; 30 L. J. Ex. 33.]

(*c*) *Sapsford* v. *Fletcher*, 4 T. R. 511. See *Boodle* v. *Cambell*, 8 Sco. N. R. 104; 7 M. & G. 386.

(*d*) *Johnson* v. *Jones*, 9 A. & E. 809.

(*e*) *Taylor* v. *Zamira*, 6 Taunt. 524.

(*f*) *Baker* v. *Davis*, 3 Camp. 474.

(*g*) *Andrew* v. *Hancock*, 1 B. & B. 37. [See as to deducting land-tax after its redemption, *Moody* v. *Dean and Chapter of Wells*, 1 H. & N. 40; 25 L. J. Ex. 273.]

lishing his exemption, the tenant has been forced to pay (*h*). The amount so deducted must, however, be paid strictly in exoneration of the landlord. Therefore where the plaintiff demised land to the defendant upon a building lease, at the rent of 60*l.*, clear of all rates and assessments, the sewers-rate and land-tax excepted, and the defendant, by building, increased the rateable value of the land to 300*l.* per annum, he was only allowed to deduct the sewers-rate and land-tax upon the original rent, and not upon the improved value (*i*).

Should be pleaded as payment.

Deductions of this sort are *pro tanto*, a payment of the rent, and not a set-off, and should be pleaded accordingly (*k*). By the express terms of the statutes, payments of land-tax, paving-rates, and property-tax must be deducted from the rent due; and if the tenant pays the rent in full, without making such a deduction, he is left without remedy (*l*). The same principle appears to be laid down by Park, J. (*m*), as applicable to other payments, as, for instance, of ground-rent. The reason is, that when the entire rent is paid, where part only is really due, the surplus is a voluntary payment, with full knowledge of the facts, and therefore not recoverable (*n*).

Should be deducted from rent next due.

II. Covenants to repair may throw that obligation either upon the tenant or the landlord. The tenant also may either contract to keep in repair during the tenancy, or leave in repair at its determination.

Actions against tenant on covenant to keep in repair.

1. When the tenant covenants to keep in repair, an action may be brought for breach of covenant at any time during the continuance of the lease (*o*). And Lord Holt ruled that in such a case the measure of damages was the amount it would cost to put the premises into repair (*p*). This view, however, has been departed from in later cases, and it has been ruled that

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(*h*) *Swatman* v. *Ambler*, 24 L. J. Ex. 185.

(*i*) *Smith* v. *Humble*, 15 C. B. 321.

(*k*) *Sapsford* v. *Fletcher*, *ubi sup.*; *Denby* v. *Moore*, 1 B. & A. 123; *Franklin* v. *Carter*, 1 C. B. 750.

(*l*) *Andrew* v. *Hancock*, *ubi sup.*; *Stubbs* v. *Parsons*, 3 B. & A. 516 *Cumming* v. *Bedborough*, 15 M. & W. 438.

(*m*) *Carter* v. *Carter*, 5 Bingh. 409, 410.

(*n*) See 1 Sm. L. C. 163, 6th Ed.

(*o*) *Luxmore* v. *Robson*, 1 B. & A. 584. [A covenant to put in repair can only be broken once; and when damages have been once recovered in respect of that breach, no more can be recovered; *Coward* v. *Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1.]

(*p*) *Vivian* v. *Champion*, 2 Ld. Raym. 1125.

the measure of damage is the extent to which the marketable value of the reversion is injured. This would be very great if the lease were near its expiration; very small if it had a long time to run (*q*). A recent case (*r*) seems opposed to this rule. The action was upon a contract to repair. Plea that the premises were in good repair until they were accidentally burnt down, and verdict for the defendant upon this plea. Damages were to be assessed contingently, in case the plea should be held bad, and Rolfe, B., directed nominal damages. He said that otherwise, as the action was brought during the tenancy, the plaintiff might put the money into his pocket, and then bring another action for non-repair, in which, on the principle contended for by the plaintiff, he would be entitled again to recover substantial damage. The plaintiff, he thought, could at most recover damages on account of the premises continuing out of repair up to the commencement of the action, and he did not see how these damages could be other than nominal. It is clear however, that this decision must have rested upon the circumstances of the particular case. As the source of the injury was found to be accidental, no damages could of course be given for allowing the premises to get out of repair. The only ground of action was for not putting them into repair. This would be measured by the extent to which the reversion was injured by such neglect at the time of action. No actual damage was proved, and as the premises were insured, and the whole thing was mere accident, the jury, no doubt, were of opinion that the reversion was not, in fact, damaged substantially by any wrong *committed by the defendant.* Nominal damages in such a case were quite just. To lay it down, however, as a general rule, that damages must necessarily be nominal for leaving a house in ruins during the currency of the term, would clearly be absurd, and could never have been intended. The value of the reversion would be essentially injured. Nor would the objection of the learned baron apply to damages given on this account. The plaintiff might, no doubt, put the money into his pocket, and commence a fresh action next day, but he could not recover substantial damages in such an action,

(*q*) *Doe d. Worcester School Trustees* v. *Rowlands*, 9 C. & P. 734; *Smith* v. *Peat*, 9 Exch. 161; 23 L. J. Ex. 84.
(*r*) *Marriott* v. *Cotton*, 2 C. & K. 553.

unless he could prove some additional injury to his reversion, subsequent to that for which he had been already recompensed.

[But though *Marriott* v. *Cotton* cannot be treated as an authority (*s*), neither can it be said that the rule laid down in *Doe* v. *Rowlands*, that the injury to the marketable value of the reversion is the measure of damages, is of universal application. In a case which was much considered in Ireland, the lease, containing a covenant to keep in repair by the lessee, had, at the time of action brought, more than eight hundred years to run. It was argued that the lessor was only entitled to nominal damages, the measure of damages being not the amount which would restore the premises to their pristine condition at the date of the lease, but the amount of injury done to the reversion, and that one shilling laid out at interest would at the end of eight hundred years far exceed the sum which the plaintiffs could then claim. Maziere Brady, C., after expressing doubts both of *Marriott* v. *Cotton*, and *Doe* v. *Rowlands*, and remarking on the difficulty of saying what upon the authorities should be the measure of damages, refused to say that nominal damages only could be recovered, and left it generally to the master to ascertain the amount of damage sustained by the plaintiff in consequence of the dilapidations (*t*). And shortly afterwards in England, where a lessee sued his sub-lessee for breach of a covenant to keep in repair, he was held entitled to recover substantial damages although he had no reversion, the lessor having ejected both lessee and sub-lessee for non-payment of rent. Bramwell, B., said, that the criterion of damage proposed, namely, the diminution in value of the reversion was a very good test, but not the only test of the damages to be recovered; and Watson, B., said "the damages recovered are usually such as are sufficient to put the premises into repair. As a matter of fact, it is never proved in evidence to what extent the reversion is damaged" (*u*).

[(*s*) In *Bell* v. *Hayden*, 9 Ir. C. L. Rep. 301, where substantial damages were recovered pending the term, O'Brien, J., stated that he had procured from the offices of the Queen's Bench in England, copies of the orders made in *Marriott* v. *Cotton*, and that the case went to the court above, and the verdict for nominal damages was set aside, and a verdict entered for substantial damages.]

[(*t*) *Macnamara* v. *Vincent*, 2 Ir. Ch. Rep. 481.]

[(*u*) *Davies* v. *Underwood*, 2 H. & N. 570; 27 L. J. Ex. 113.]

In a recent case the action was brought by the assignees of a bankrupt lessee against the representatives of the lessor for breaches of covenants to put premises in repair and keep them in repair. The defendants, *inter alia*, pleaded to the breach of covenant to keep in repair for a defence on equitable grounds, that the lessee had recovered a sum of 1080*l.* in an action for breaches of the covenants to put and keep in repair, and that if he had expended that sum in putting the premises in repair, the want of repair now complained of would not have existed. Upon demurrer it was held that this was a bad plea, and that the matters alleged in it did not amount to a bar of the action, but went in mitigation of damages (*x*).]

Where the landlord has repaired himself.

Where the landlord is forced to repair himself, even in the midst of his tenant's term, in order to save a forfeiture of his own estate to his head landlord, the measure of damages will, of course, be the cost of such repairs, so far as they are fit and necessary. And it is not necessary for the plaintiff to prove that the defendant assented to the repairs being done by him, because, if there is no assent, the plaintiffs would be trespassers and liable to an action for the entry (*y*). In such a case it would not operate in mitigation of damages, that the plaintiff had, before the commencement of the action, assigned the premises to a third party, who pulled them down and entirely rebuilt them. The injury was done when his breach of covenant compelled the plaintiff to lay out money (*z*).

When damage was before execution of lease.

The interest in premises passes from the execution of the lease, though the duration of the term may date from some anterior period. Therefore, where the tenant entered upon the premises in June, and the lease was executed in November, *habendum* from June, with covenant to repair: an action was brought upon the covenant, the breach being that he pulled down and altered the premises between June and November; it was held that only nominal damages could be recovered (*a*).

[(*x*) *Coward* v. *Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1. The difficulty of reducing the measure of damages to fixed rules in such cases is dwelt upon in the judgment of Willes, J.]

(*y*) *Colley* v. *Streeton*, 2 B. & C. 273.

(*z*) *Ibid.*, *ubi sup.*

(*a* *Shaw* v. *Kay*, 1 Exch. 412.

Damages against assignee of lease.

The assignee of a lease is, of course, only liable for breach of covenants committed during his own holding. But where the lease has passed through several hands, and the premises are out of repair when the action is brought, and are proved to have been so when they were held by the defendant, it will be for him to show how much of the injury arose subsequent to his occupation. And in default of evidence by him, the jury may assess the damage at the whole amount to which he would have been liable, had all the dilapidations taken place in his own time (*b*).

Proof of disrepair.

Of course strict proof must always be given of the amount of disrepair. Accordingly, where a county court judge told the jury that this action was not like one for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises with the particulars of demand in their hands, and would therefore be able to judge if the plaintiff had made out his case,—a new trial was granted (*c*).

When action is brought at the end of the term.

2. Where the action is brought upon the covenant to repair at the end of the term, the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them ; where, beside the covenant to repair, there is also a covenant to insure against fire for a specific sum, the defendant's liability, in case of the premises being burnt down, is not limited to this sum. The condition is only intended as an additional security to the landlord (*d*). The defendant, however, is not liable to pay for improved modes of doing the work, by means of which the parts repaired are more durable than they were on their former principle of construction (*e*).

When the covenant is only to repair the demised premises, the defendant is not bound to repair any buildings afterwards erected, even though he was wrong in erecting them, and no damages can be recovered in respect of the disrepair into which they may have fallen (*f*).

(*b*) *Smith* v. *Peat*, 9 Exch. 161 ; 23 L. J. Ex. 84.
(*c*) *Smith* v. *Douglas*, 16 C. B. 31.
(*d*) *Digby* v. *Atkinson*, 4 Camp. 276.
(*e*) *Soward* v. *Leggatt*, 7 C. & P. 613.
(*f*) *Doe d. Worcester School Trustees* v. *Rowlands*, 9 C. & P. 734. [Every such

When plaintiff's interest has ceased.

It is no answer to a claim for dilapidations, that the plaintiff's interest in the premises has ceased. The plaintiff may be liable over to his superior landlord; but independently of this, the objection cannot be set up by a party who is himself in fault (*g*).

Damages must arise from the defendant's neglect.

Of course no claim can be maintained for any damages which do not flow immediately from the defendant's neglect. Therefore, where the plaintiff held land under several covenants, one of which was a covenant to repair, with a right of entry by the landlord on breach of the covenants, and made a sub-lease to the defendant, with a covenant to repair, which was broken by the defendant. The head landlord ejected the plaintiff for breach of all the covenants, including that violated by the defendant. It was held that the plaintiff could not recover from the defendant the value of the term so forfeited, since there were other breaches besides those in the defendant's lease, and it did not appear on which of them the ejectment had turned. And Maule, J., and Bosanquet, J., doubted whether, in any case, the sub-tenant could be liable in such an action for all the consequences to his landlord of a breach of covenant contained in a lease to which he was not himself a party (*h*).

Meaning of a covenant to repair.

In estimating the amount of damages, it is of course, important to know what state of repair the tenant was bound to put the premises into. Where the covenant is, "to put the premises into repair," this clearly means to put them into a better state of repair than the tenant found them in (*i*). It has also been decided, however, that a covenant to "keep" in repair involves a covenant to put in repair. For they cannot

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covenant must be construed according to its particular words; *Cornish* v. *Cleife*, 3 H. & C. 446; 34 L. J. Ex. 19; and sometimes a distinction may exist between a liability to repair newly-erected houses and a liability to repair newly-erected additions to existing houses; *per* Bramwell, B., *Ib.*]

(*g*) *Clow* v. *Brogden*, 2 M. & G. 39; [and see *Davies* v. *Underwood*, *ante*, p. 191. In another case, a lessor recovered substantial damages for dilapidations, although at the expiration of the term the premises were pulled down under a verbal arrangement for that purpose made previously with a proposed new lessee. But in this case the Court laid stress on the fact that the agreement with the proposed new lessee was verbal only, and therefore not binding on either party; *Rawlings* v. *Morgan*, 18 C. B. N. S. 776; 34 L. J. C. P. 185.]

(*h*) *Clow* v. *Brogden*, *ubi sup.*, 2 Sco. N. R. 303, 314, S. C.

(*i*) *Belcher* v. *M'Intosh*, 8 C. & P. 720.

What amount of repair is necessary.

be kept in good repair without being put into it (*k*). But the amount of repair, of course, depends on the age and class of the house, and must differ as that may be a palace or a cottage. No one is bound to give his landlord a new house instead of an old one (*l*). A house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square (*m*). And, accordingly, where a lessee took premises, which at the time were old and out of repair, under a covenant to repair; and they were destroyed by fire, it appeared that the cost of reinstating them would amount to 1635*l.*, but they would then be more valuable by 600*l.* than they were at the time of the fire; it was decided that defendant was only liable to pay 1035*l.*, that being the amount which the plaintiff had really lost (*n*). This is all quite clear; but a more difficult question arises as to how far evidence of actual *disrepair*, as distinguished from mere inferiority, may be admitted. The rule laid down in *Stanley* v. *Towgood* (*o*), and *Mantz* v. *Goring* (*p*), and approved of in *Payne* v. *Haine* (*q*), was, that evidence might be given as to the age and class of the premises, with their general condition as to repair; but that the defendant could not prove in detail that such and such a part was out of order. *Burdett* v. *Withers* (*r*) has been thought to go beyond this. There the defendant's counsel wished to cross-examine as to the state of the premises at the time of his coming into possession. The evidence was refused, and a new trial was granted in consequence. Lord Denman said, "It is very material with a view both to the event of the suit, and the amount of damages, to show what the previous state of the premises was." And in *Payne* v. *Haine*, Alderson, B., says, "The marginal note (*s*) of *Burdett* v. *Withers* may be incorrect; but the judgment is

(*k*) *Payne* v. *Haine*, 16 M. & W. 541; [*Easton* v. *Pratt*, 2 H. & C. 676; 33 L. J. Ex. 31, 233, in Ex. Ch.]
(*l*) *Per* Alderson, B., *Belcher* v. *M'Intosh*, 8 C. & P. 723.
(*m*) *Per* Parke, B., *Payne* v. *Haine*, 16 M. & W. 545.
(*n*) *Yates* v. *Dunster*, 11 Ex. 15; 24 L. J. Ex. 226.
(*o*) 3 B. N. C. 4.
(*p*) 4 B. N. C. 451.
(*q*) 16 M. & W. 545.
(*r*) 7 A. & E. 136.
(*s*) "The defendant is entitled to prove at the trial what the state of the premises was at the time of the demise."

quite right, and shows that a lessee who has contracted to keep demised premises in good repair, is entitled to prove what their general state of repair was at the time of the demise, so as to measure the amount of damages for want of repairs by reference to that state." This reconciles that case with the others mentioned before. The question, therefore, for the future will probably be, not so much as to the admissibility of such evidence, as the purpose to which it may be applied. Since *Payne* v. *Haine*, a tenant cannot justify keeping premises in bad repair, because they happened to be in that state when he took them. But evidence of this nature, like evidence of age, will be admissible to show how far they were capable of being repaired at all, and what amount of repair could have been contemplated by the covenant (*t*).

The doctrine of *Payne* v. *Haine* will be peculiarly difficult of application in the case of assignees of a term, where the original lease contained covenants to repair. Each assignee is only liable for breach of covenant committed during his own holding. But if he is bound, not only to keep the premises in as good repair as he got them, but to put them into better, where there is actual disrepair, he will in effect be liable for all the breaches of his predecessors. In the recent case of *Smith* v. *Peat* (*u*), it is said he might be called to prove the state of the premises at the time of the assignment to him. But it is clear that that dictum must be taken with some limitation.

Expenses of survey.

The expenses of survey are usually borne by the landlord, unless there be some special agreement to the contrary. It is not, therefore, common in an action for breach of covenant, by the dilapidation of premises, to allow to the landlord the expenses he has been put to in ascertaining what has been the extent of injury sustained. Incidentally, however, the jury consider this matter, in estimating the amount of damages they give by their verdict (*x*).

(*t*) See *Harris* v. *Jones*, 1 M. & Rob. 173, and *Gutteridge* v. *Munyard*, *ib.*, 334, 336, where Tindal, C. J., says, "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value constitute a loss, which, so far as results from time and nature, falls on the landlord."

(*u*) 9 Exch. 161; 23 L. J. Ex. 84.

(*x*) Woodf. L. & T. 466, 5th ed. [489, 7th ed., by Harrison and Horn.]

Repairs of party-wall.

A tenant [was] not liable, on his general covenant to repair, for the repairs of a party-wall effected under 14 Geo. III. c. 78 (*y*), except so far as they were rendered necessary by his own default, and it was for the landlord to establish the circumstances under which he claimed to charge the tenant with any proportion of the expense so incurred (*z*).

Where there is a condition precedent.

The landlord's claim to recover for breach of a covenant to repair may depend on the performance of some condition precedent, such as putting the premises in repair himself (*a*). Such a condition, when applied to a single house and premises, is indivisible, and where the landlord has only repaired a part he cannot recover for non-repair by the tenant, even of the very part which he has put into repair. But if the covenant applied to two separate dwelling-houses, of which one might be completely enjoyed, though the other was not in a condition for proper occupation, the covenants would be divisible, and the performance of one part would, it seems, entitle to an action for the non-performance of the corresponding part of the covenant (*b*).

Where one count of a declaration stated an agreement by plaintiff and defendant to take certain premises, subject to a covenant to repair, and alleged non-repair; the second count stated, that in consideration that defendant was tenant to plaintiff of a certain other messuage, he promised to use it in a tenant-like manner, laying as a breach, that he had made holes in the walls, &c.: one demise only as to one house was proved; it was held that damages could not be recovered on both counts, as they must be taken to refer to different messuages (*c*).

Action against the lessor.

3. Covenants to repair on the part of the lessor present no distinction as to the amount of damages that may be recovered. In an action by the tenant on such a covenant, it was held that he could not recover, as special damage, rent, taxes, and other sums laid out upon a house into which the plaintiff was forced

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[(*y*) Repealed by 28 & 29 Vict. c. 90, s. 34.]

(*z*) *Moore* v. *Clark*, 5 Taunt. 90.

[(*a*) *Neale* v. *Ratcliff*, 15 Q. B. 916; *Coward* v. *Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1. See, as to the tenant's right to timber, *Bristol (Dean and Chapter)* v. *Jones*, 1 E. & E. 484; 28 L. J. Q. B. 201.]

(*b*) *Neale* v. *Ratcliff*, 15 Q. B. 916.

(*c*) *Holford* v. *Dunnett*, 7 M. & W. 348.

to move, while his own was uninhabitable. Because, although the defendant covenanted to repair, he did not covenant to find him another house while the repairs were going on, any more than he would have been bound to do so if the premises had been consumed by fire (*d*). But an allowance might be made for the additional time during which he was obliged to be in another house, on account of defendant's delay in commencing repairs (*e*). Where the defendant covenants to repair part of the premises only, injury done to the other parts by the non-repair of the former may be recovered, if it resulted from neglect on the plaintiff's part (*f*). It was ruled in one case, that if the premises become more out of repair after the commencement of the action, the jury may consider this in assessing damages (*g*). This, of course, only applies where the defendant is still liable (*h*).

Actions for breach of building covenants.

III. Building and Mining covenants. For breach of these, the only criterion is the amount of damage the plaintiff has suffered by the diminished value of the premises. Plaintiff agreed to let defendant land for ninety-eight years, from 1835, at a pepper-corn rent for three years, and afterwards at 115*l.* per annum. Defendant was to build on the ground in three years, and then accept a lease. There was a proviso for re-entry in case of default. Defendant did not build, and in 1839 plaintiff got possession of the land. He then demised to B. for the residue of defendant's term, at a pepper-corn rent for the year ending Midsummer, 1840; 70*l.* for the next year, and 140*l.* for the rest of the term. He then sued defendant for breach of agreement to build; and, amongst other things, claimed as damages the difference between the rent which he would have obtained up to 1841, had defendant kept his agreement, and that which he was to obtain from the new tenant:—Held that the jury were not bound to give him that difference; that the real measure was the damage he had on the whole sustained, and that in estimating this they must consider the new agreement he had entered into. Accordingly they found

(*d*) *Green* v. *Eales*, 2 Q. B. 225.
(*e*) *Ibid.*
(*f*) *Ibid.*
(*g*) *Shortridge* v. *Lamplugh*, 2 Ld. Raym. 803; see *ante*, p. 64.
[(*h*) See further as to damages recoverable against the lessor, *Coward* v. *Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1.]

that no damage had accrued beyond 2*l.* which had been paid into Court (*i*).

Covenant to mine.

In a very recent case, the action was on a contract, by which the defendants agreed that if the plaintiff would surrender to his lessor the land then in his possession, they would, on obtaining a lease of it to themselves, sink a shaft to the depth of 130 yards in search of coal, and if they found a vein of marketable coals, would pay the plaintiff 2500*l.* The defendants never sank a shaft. Evidence was given that if a shaft had been sunk to the depth of 130 yards, a vein of marketable coal would have been found: the cost of such a shaft would have been 2600*l.* The judge told the jury, that the plaintiff had a right to have a pit sunk to the depth agreed on at the defendants' cost, and that they ought either to estimate the damages with reference to the expense of so doing, or might give the amount which would have become payable on the contingency. A verdict was given for 2500*l.* A rule to enter nominal damages was refused. Pollock, C. B., Alderson, B., and Martin, B., gave no opinion as to which alternative in the judge's ruling was most correct. Parke, B., inclined to think that the expense of sinking the pit was a wrong criterion of damage, because the plaintiff could not go upon the land and make it. But at all events, he said, this was a case for more than nominal damages; and as the defendants had been instrumental in preventing the discovery of marketable coal, they ought to pay the plaintiff such an amount as he had lost by their neglect to perform the covenant (*k*). If this had been a covenant between the lessor and lessee of the mine, Baron Parke's objection would of course fail, since at the expiration of the lease he could himself sink the pit. As long as there was any chance that a mine might be found, he would obviously be entitled to the cost of the shaft, which the defendant had undertaken to make at his own expense. But suppose all possibility of a mine being found, and therefore of any advantage being derivable from the shaft, could be negatived, what would be the damages then? None could be given in respect of the payment of 2500*l.*, because, by the hypothesis, it could

(*i*) *Oldershaw* v. *Holt*, 12 Ad. & E. 590.
(*k*) *Pell* v. *Shearman*, 10 Exch. 766.

never become due. Then the damages would be measured by the loss he had sustained by not having a shaft sunk, free of charge, in his own land. It is hard to see that more than nominal damages could be recovered for this; since here also, by the hypothesis, no damage could accrue from breach of the covenant, as no benefit would flow from its performance.

IV. There are various cases in which the occupier of land covenants to make certain payments, connected with his interest in it.

Covenant to pay renewal fine.

1. Covenants to pay renewal fine. When the plaintiff held an archbishop's lease, renewable from time to time by payment of fines, and demised to the defendant for a term, the latter covenanting, that he would from time to time, and at every time during the said term, pay to plaintiff or the archbishop, such part of the fine or fees which, upon every renewal of the lease by which plaintiff held the premises, should be paid or payable by plaintiff in respect of the premises demised to defendant. Plaintiff renewed for a longer period than the term demised by him to the defendant, and it was ruled that the latter was only liable for a part of the fines, commensurate with the interest which defendant now acquired in the premises (*l*).

Covenant to insure where no loss has occurred.

2. Covenant to Insure. In an action for breach of this covenant, the plaintiff, who had himself paid the insurance premium, was held entitled to recover it back from the defendant as damages, no special loss having occurred (*m*). In this case the plaintiff was himself a lessee, bound by covenant to insure, and the defendant was his assignee, who had taken subject to the original covenants, so that the payment by the plaintiff was necessary for his own safety. Even in the ordinary case of lessor and lessee, the same rule would, it is conceived, hold good. If the plaintiff has paid the insurance premiums, he ought to recover their amount; because as he is entitled to the protection of an insurance policy, he is also entitled to adopt such means as may keep it on foot. If, however, he has not paid the premiums, then the question is, how much is the reversion the worse by reason of the lapse or non-existence of such a policy; no loss having as yet

(*l*) *Charlton* v. *Driver*, 2 B. & B. 345.
(*m*) *Hey* v. *Wyche*, 12 L. J. Q. B. 83.

occurred? The answer to this would seem to be, that the loss to the reversion is measured by the amount which it would cost the plaintiff to put himself into the same position, as he would now be in, had the defendant kept his contract. If no insurance has been effected, this amount would consist of the cost of entering into one; that is, all the charges which a party has to incur at starting, before his next premium falls due. If a policy has been effected, then the arrears of premiums (if the office will accept them) or the cost of a new policy, whichever is cheaper. It seems plain that this is all to which the plaintiff is entitled; he can claim nothing in respect of the past risk, for this is over; nor in respect of past payments, for he has made none. The cost of commencing an insurance will, at any moment, secure him against risk till default made in paying the premiums; and when this takes place, he may pay them himself, and recover their amount as damages.

These views are to a considerable extent confirmed by the Court of Common Pleas, in a recent case, where the question incidentally arose. It was agreed by the terms of a charter-party, that the charterers should pay one-third of the freight in advance—the same to be returned if the vessel did not reach her destination—the charterers to insure the amount at the owner's expense, and deduct the cost of so doing from the first payment of freight. The charterers paid the one-third freight, deducting insurance premium. The vessel and cargo never arrived. The charterers sued for a return of the freight. The owners pleaded that if the insurance had been properly effected, it would have indemnified them against the loss of the one-third freight stipulated to be returned. That by the negligence of the charterers, the insurance had become worthless. Consequently, that the defendants had a right of action against the plaintiffs, to exactly the same amount, as that which the plaintiffs had against them. This, if true, would have made the plea good, in avoidance of circuity of action. It was held bad, on the ground that the damages for negligence in insuring were not necessarily the same as the freight to be returned. Maule, J., said, "I do not think that the concluding allegation sufficiently identifies the sum mentioned in the plea with that sought to be recovered by the

declaration. That which is complained of in the plea would give the defendants a right of action against the plaintiffs, so soon as they were guilty of the negligence charged, and the defendant was thereby damnified. That which happened subsequently does not necessarily determine the amount of damages the defendant would be entitled to. A jury might have given exactly the same amount of damages before as after the loss. The question is, what damage has the party sustained at the time the cause of action vested in him? If nothing had happened, and a policy might then have been effected, the jury would consider what was probable: if the loss had then happened, they perhaps might have given the full amount; but they were not bound to do so. There were a variety of circumstances which they might properly take into their consideration. Therefore, it is not a necessary and conclusive thing that the sum to be insured by the policy, neither more nor less, is the sum which the plaintiffs would have to pay; but a compensation for the injury resulting from their negligence." "Perhaps, after the loss, they would be bound not to give more than the amount of the actual loss, when no greater loss could happen" (*n*). It will be observed that it was not necessary for the Court to lay down positively what the measure of damages would be, where the action was brought before a loss had arisen. It was sufficient for their purpose to show that they were not *necessarily* the full amount of the policy (*o*). This will account for the absence of any direct and positive assertion as to the rule of law in such a case.

Where a loss has occurred.

There seems, on principle, no reason to doubt that *after* a loss had occurred, the measure of damages would be the exact value of the thing lost, which ought to have been insured. A very recent case expressly decides the point. R., the owner of a saw-mill, received from B. timber to be sawed. An agreement was made as to its being kept insured by R., as to which various evidence was given. According to one account the agreement was, that R. should hold all B.'s timber insured from fire, and should pay its value if burnt. According to another account, the whole substance of what

(*n*) *Charles* v. *Altin*, 15 C. B. 46, 65; 23 L. J. C. P. 197, 204.
[(*o*) So in *Cahill* v. *Dawson*, 3 C. B. N. S. 106; 26 L. J. C. P. 253.]

passed as to insurance was, that the goods should be always insured from fire. No written memorandum was made—no particular office was mentioned—no time for insurance was mentioned, nor any particular amount. No insurance was effected. The goods were burnt, and R. became bankrupt. B. applied to prove for the value of the timber. His right depended upon the question, whether his claim was for an ascertained amount, or for unliquidated damages. It was decided on appeal to the Lords Justices that his claim was admissible. The Court held that on the whole evidence they were satisfied that there was a contract on the part of the bankrupt to make good the value of the timber. L. J. Turner, however, added, "In any event it seems to be clear that there was a contract on the part of the bankrupt to insure the petitioner's timber, and that this insurance was to be made for the purpose of securing to the petitioner the value of his timber, in case it should be destroyed by fire; and under such circumstances, I apprehend, that the value of the timber would be the measure of damages in an action for breach of the contract." This being so, and the value of the timber being an ascertained thing in the market, the amount of the claim of course became a mere matter of account (*p*).

Loans secured by assignment of policy.

[Loans by insurance companies are frequently secured by the assignment of a policy effected with the company by the borrower, who covenants to keep up the policy by paying the premiums. Upon his failing to do so companies have claimed to be entitled to recover in an action for breach of covenant the amount of unpaid premiums, but it has been held that this is not the proper measure of damages. If the company has effected a fresh insurance and paid the premiums to other insurers they may be entitled to recover what they have paid, but being themselves the insurers their real damage is the loss of the security. How this is to be estimated has not been suggested, but in the absence of any expense

(*p*) *Ex parte Bateman*, 20 Jur. 265; 25 L. J. Bkcy. 19; [approved by Erle, C. J., *Betteley* v. *Stainsby*, 12 C. B. N. S. at p. 499; 31 L. J. C. P. at p. 342. In Upper Canada it has been on this principle laid down, that the measure of damages is the value of the premises lost to the plaintiff by the neglect to insure, not exceeding the sum in which the defendant was to have insured by his covenant; *Douglass* v. *Murphy*, 16 Upper Canada Q. B. 113.]

shown to have been caused by the breach, nominal damages have been held to be alone recoverable (*q*).

Where a deed by which the defendant assigned to the plaintiffs a policy of insurance upon his own life contained a covenant that he would not do anything by which the policy should be forfeited, and a forfeiture was caused by the defendant's going beyond the limits of Europe without the licence of the assurers, the damages were assessed upon the present value of the policy, to be assessed by an actuary, taking into consideration that the defendant covenanted to pay and should pay premiums on the policy (*r*).]

Covenant to pay rates.

3. A covenant to pay rates is broken as soon as the rates are due, though no demand has been made (*s*). I can find no case in which any rule is laid down about the measure of damages in such an action. There would of course be a broad distinction, according as the rates were primarily payable by the person who covenants to pay them or not. For instance, if the landlord covenanted to pay what was usually tenant's taxes, this would be similar to a covenant to pay off incumbrances, and the whole amount of the tax would be recoverable, even though none had been paid by the tenant (*t*). On the other hand the tenant may covenant to pay his own taxes, for which the landlord is not liable at all, except by means of legal process against his house. This would seem to be analogous to a covenant to repair, and the measure of damage would be the injury to the reversion, by having arrears of taxes due, distresses put in, and the like.

Alternative covenants.

Where there are alternative covenants, and plaintiff declares for a breach of both, if money is paid, and accepted in satis-

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[(*q*) *National Assurance Co.* v. *Best*, 2 H. & N. 605; 27 L. J. Ex. 19; *Browne* v. *Price*, 4 C. B. N. S. 598; 27 L. J. C. P. 290. In this last case the deed provided that unpaid premiums paid by the plaintiffs should be added to the principal debt and charged upon the land, but contained no covenant by the defendant to repay premiums paid by them. See also *Warburg* v. *Tucker*, E. B. & E. 914; 28 L. J. Q. B. 56 in Ex. Ch. A mortgagee cannot insure and add the premiums to his mortgage debt in the absence of an express contract authorising him to do so; *Brooke* v. *Stone*, 34 L. J. Ch. 251.]

[(*r*) *Hawkins* v. *Coulthurst*, 5 B. & S. 343; 33 L. J. Q. B. 192. An executor who dropped a policy on the life of a debtor to the testator's estate, without consulting those beneficially interested, was held liable for the whole sum which would have been recovered if he had kept up the policy; *Garner* v. *Moore*, 3 Drew. 277; 24 L. J. Ch. 687.]

(*s*) *Davis* v. *Burrell*, 10 C. B. 821.

(*t*) See *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; *ante*, p. 149.

faction of one, the plaintiff is only entitled to nominal damages in respect of the other (*u*).

Covenant to deliver up possession.

[4. In an action for breach of covenant to give up possession at the end of a term, the plaintiff can recover only the actual damage which he has sustained. This was ruled in a case in which the defendant was tenant to the plaintiff, who was the owner of the equity of redemption. The lease contained a covenant to deliver up the premises and all fixtures therein at the expiration of the term. The term expired on the 1st April. The plaintiff demanded possession on the 10th, but it was not given. On the 13th April the mortgagee gave notice to the plaintiff to pay the rent and deliver up the premises to him. The plaintiff sued the defendant for breach of covenant in not delivering up the fixtures, and the defendant paid 5*l.* into Court, which the jury found to be sufficient to cover the actual damage sustained by the plaintiff being deprived of the possession of the fixtures for three days. The plaintiff claimed to have the verdict entered for him for the full value of the fixtures, but a rule to that effect was discharged. Martin, B., said that the absurd result would follow from the plaintiff's reasoning, that where a person hired a chattel and agreed to deliver it up on a certain day, but did not do so, and it afterwards turned out that the chattel was stolen, and the true owner demanded possession, the person who lent it might recover the whole value of the stolen chattel. No doubt he might maintain an action, because the person who hired the chattel agreed to deliver it up on a certain day, but he would only be entitled to nominal damages. In an action on a covenant in a lease to deliver up the land, the sum to be recovered would not be the value of the land but the real damage sustained (*x*).

Covenant not to assign.

5. In an action for breach of covenant not to assign, an arbitrator in assessing damages was directed to find such a sum as would, as far as money could, put the plaintiff in the same position as if he had still the defendant's liability for the breaches of the other covenants, instead of the liability of a person of inferior ability, and to take into consideration breaches both past and future (*y*).]

(*u*) *Foley* v. *Addenbrooke*, 13 M. & W. 174.

[(*x*) *Watson* v. *Lane*, 11 Ex. 769; 25 L. J. Ex. 101. See also *Henderson* v. *Squire*, L. R. 4 Q. B. 170; 38 L. J. Q. B. 73.]

[(*y*) *Williams* v. *Earle*, L. R. 3 Q. B. 739; 9 B. & S. 740.]

CHAPTER X.

CARRIERS.

I. Actions by Carriers.

1. *For Freight.*
2. *For Breach of Contract to provide Cargo.*

II. Actions against Carriers.

1. *For Breach of Contract to Carry.*
2. *For Injury or Loss to Goods.*

THE extensive commercial transactions of this country render contracts for the conveyance of goods a matter of great and daily importance, and the doctrine of damages, arising out of such contracts, presents some peculiar considerations.

There are some distinctions, principally statutory, between the liability of carriers by land and sea, but the whole subject may without confusion be examined in a single view.

Actions may be brought upon a contract of carriage, either by the carrier, or by the owner of the goods. The former may sue for the costs of carriage, or for breach of the contract to employ him. The latter may sue for a refusal to convey the goods, or for their loss or injury.

I. Actions by carriers.

Land carriage.

1. Actions for the price of carriage are generally much less complicated where the carriage is by land than by sea. A fruitful source of discussion, however, has sprung up between the railway companies and other carriers, on the subject of the charges made upon the latter for carrying goods, collected by them from various customers. One point of controversy arose out of the packed parcel question, viz., the right of the railway companies to impose peculiar terms upon the carriage of large packages of goods, in which a number of smaller packages were contained. These cases are so involved in the particular wording of the private Act, authorising tolls to be taken, that it

Packed parcels.

would be impossible to attempt a statement of the facts. The general rule, however, is laid down beyond doubt, that where the company carries such parcels for any of the public, they must carry them for all on the same terms, and that the fact of their having issued orders, stating that they would no longer carry them, makes no difference, if, as a matter of fact, they do continue to carry them for some (*a*). Any overcharge may be recovered as money had and received to the use of the plaintiff (*a*).

Actions for freight.

On the other hand, questions of nicety very often arise in actions for freight due on account of the various modes in which contracts for carriage by sea are formed, and the uncertainty that may prevail at the time of the contract as to the species of goods that are to be conveyed.

Where entire ship engaged.

Where the entire ship has been engaged at a specific price, or where a cargo has been loaded at a settled price per ton, of course the matter is simple enough. In the former case, the whole sum will be payable, though the merchant only fills part of the ship (*b*).

Where the covenant was to pay for hides at so much per pound net weight at the scales, and it appeared that the packages were wrapped in hides of an inferior quality, which are generally somewhat damaged, and the evidence varied as to whether freight was paid for them or not, and whether they paid duty:—Held that they must pay both freight and duty (*c*).

When payment is to be made by the ton.

Where an entire ship, of a certain specified burthen, is hired, and the charterer agrees to pay a certain sum for every ton of goods which he shall have on board, but does not agree to supply a full cargo, he is only liable for the actual amount carried (*d*).

(*a*) *Parker* v. *G. W. Ry. Co.*, 7. M. & Gr. 253; 11 C. B. 545; *Edwards* v. *G. W. Ry. Co.*, 11 C. B. 588; *Crouch* v. *G. N. Ry. Co.*, 9 Exch. 556; *Crouch* v. *London and N. W. Ry. Co.*, 14 C. B. 255; [*Baxendale* v. *G. W. Ry. Co.*, 14 C. B. N. S. 1; 32 L. J. C. P. 225; and 16 C. B. N. S. 137; 33 L. J. C. P. 197, in Ex. Ch.; *Baxendale* v. *London and S. W. Ry. Co.*, L. R. 1 Ex. 137; 35 L. J. Ex. 108; 4 H. & C. 130; *Sutton* v. *G. W. Ry. Co.*, 3 H. & C. 800; 35 L. J. Ex. 18; affirmed, L. R. 4 H. L. 226; 38 L. J. Ex. 177. Under the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 17, railway companies are bound upon application to furnish accounts showing how much of their charge is for conveyance of goods upon the railway, and how much for collection, delivery, and other expenses.]

(*b*) Abbott on Shipping, 410. [367, 11th ed.]

(*c*) *Moorsom* v. *Page*, 4 Camp. 103.

(*d*) *James (Lady)* v. *East India Co.*, Abbott on Shipping, 412. [368, 11th ed.]

And a full cargo is to be supplied.

On the other hand, where he does agree to supply a full cargo, his liability is not limited to the tonnage expressed in the charter-party; and the burthen being described as 261 tons or thereabouts, whereas the vessel would really have held 400 tons, it was held that the merchant must pay for the entire amount she could have stowed. Of course, if there was a fraudulent representation it would be different (*e*). If part of the cargo has been delivered to, and received by the consignees, freight is payable upon it, even though the rest has not been delivered, and though it has not been landed at the port named in the charter-party, but at some other port to which the consignee directed the captain to come (*f*).

Weight, how calculated.

In the absence of any special contract, it is said that freight payable by weight is to be calculated upon the net weight, as ascertained at the king's landing scales, and not according to that expressed in the bill of lading (*g*). But where the bill of lading was of 100 lasts of wheat, in 2092 bags, upon which freight was to be paid at 14*l.* sterling per last; the bill of lading bore date Dantzic; no evidence was given that the corn was measured at Dantzic by either party, but it appeared that the Dantzic last was much larger than the English, and that the English last was the one by which the defendant had purchased. The plaintiff therefore sought to be paid freight for 100 lasts, which the cargo was believed to amount to in English measure, and which were expressed in the bill of lading. The defendant, on the other hand, claimed only to pay freight on such a reduced number of lasts as the whole cargo would amount to if measured by the Dantzic scale:—Held that no evidence was admissible to vary the written contract, which stated the number of lasts to be 100, and that the plaintiff's mode of calculation was the true one (*h*).

Freight where cargo changes in bulk or weight.

[Goods sometimes change in bulk or weight during a voyage or after delivery. In such cases it has been laid down that, special contract and usage of trade apart, freight is to be cal-

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(*e*) *Hunter* v. *Fry*, 2 B. & A. 421; *Thomas* v. *Clarke*, 2 Stark. 452; [*Barker* v. *Windle*, 6 E. & B. 675; 25 L. J. Q. B. 349.]

(*f*) *Christy* v. *Row*, 1 Taunt. 300. In that case the non-arrival at the right port, and the non-delivery of the rest of the cargo, arose from restraint of princes, a peril excepted against.

(*g*) *Geraldes* v. *Donison*, Holt, N. P. 346.

(*h*) *Moller* v. *Living*, 4 Taunt. 102.

culated and paid on that amount only which is put on board, carried throughout the whole voyage, and delivered to the merchant (*i*). Thus, where wheat increased in bulk from being wetted during the voyage, freight was recovered on the quantity shipped, and not on that delivered (*k*). And so where cotton shipped in compressed bales expanded on being unloaded (*l*).]

Mode of calculating freight, which has been fixed with reference to articles that are not carried.

A case which has, on several occasions, caused a good deal of debate, is that in which the rate of freight has been fixed with a view to certain articles, and either none or only some of these have been actually carried. The question has then been, What freight was payable on the remaining articles? The rule seems now, however, to be established as follows:—Where a charter-party provides for the carriage of various classes of goods at specified rates, and gives no permission for the substitution of other goods; or permits, but does not provide a scale of payment for such substituted goods; in either case, the freight payable in respect of them is calculated upon an average of what would have been earned, by carrying a similar amount of all the enumerated articles in equal quantities (*m*).

But where some of the enumerated articles are limited as to the amount which may be carried, and that amount has been reached, the freight of the non-enumerated articles can only be calculated on an average of the remaining articles (*n*). And in all cases where a particular class of goods are to be calculated according to a particular scale of bulk, &c., that scale

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[(*i*) *Gibson* v. *Sturge*, 10 Ex. 622; 24 L. J. Ex. 121; *Buckle* v. *Knoop*, L. R. 2 Ex. 333; 36 L. J. Ex. 223, in Ex. Ch. In both of these cases the cargo had increased in bulk. Willes, J., in his elaborate judgment in *Dakin* v. *Oxley*, 15 C. B. N. S. 646; 33 L. J. C. P. 115, after mentioning the rule as applicable to cases where the cargo has accidentally swelled, speaks of it as "perhaps" applying where the cargo has diminished, and draws attention to some arbitrary provisions in foreign codes respecting loss of liquids. In the West India trade, freight of sugar and molasses is said to be regulated by the weight of the casks at the port of delivery, the loss of freight by leakage falling on the owners of the ship. Abbott on Shipping, p. 382, 11th ed. This would seem to follow naturally from the rule laid down in *Gibson* v. *Sturge*, that to constitute a title to freight, the commodity must be "shipped, carried, and delivered."]

[(*k*) *Gibson* v. *Sturge*, *supra*.]

[(*l*) *Buckle* v. *Knoop*, *supra*. In that case it was found to be usual to ship cotton at Bombay in compressed bales. In *Coulthurst* v. *Sweet*, L. R. 1 C. P. 649, there were express words making the freight payable per ton, "nett weight delivered."]

(*m*) *Capper* v. *Forster*, 3 B. N. C. 938.

(*n*) *Cockburn* v. *Alexander*, 6 C. B. 791.

must be applied in estimating the freight, though, were it not for the agreement, it would furnish an incorrect standard of measurement (*o*).

The facts of the above three classes of cases were these:—

1. A charter-party provided that the merchant should ship a full and complete cargo of lawful merchandise, which was to be *delivered up on being paid freight as follows:* viz., for gum, bees'-wax, ivory, and palm-oil, 4*l.* per ton: hides, 7*l.* per ton: rice, 3*l.* per ton. A full cargo was not shipped, and it was held on the authority of *Thomas* v. *Clarke* (*p*), that the same rule should be applied to a deficient cargo as to none at all, and that the short-coming should be calculated by an average of what might have been shipped of all the articles specified (*q*).

2. Covenant to load a full cargo of wool, tallow, bark, or other legal merchandise, the entire quantity of bark not to exceed 100 tons, and the quantity of tallow and hides not to exceed 80, to be delivered up *on being paid freight as follows:* pressed wool, 1½*d.* per pound; unpressed, 1⅝*d.* per pound; tallow, 3*l.* per ton; bark, 4*l.* per ton; and hides, 2*l.* per ton; the latter not to exceed 20 tons, without the consent of the captain. She brought home less than the stipulated quantity of some of the articles, more of others, and some not named at all:—Held that the owners were entitled to payment as if she had brought home the full amount of the enumerated goods, viz., 100 tons of bark, 60 of tallow, and 20 of hides, and the remainder wool pressed or unpressed (*r*).

3. In the last case there was a proviso for shipment of a full cargo *of produce*, freight to be paid at and after the rate of 5*s.* 6*d.* per barrel of flour, meal, and naval stores, and 11*s.* per quarter of 480 pounds of Indian or other grain. The cargo was not to consist of less than 3000 barrels of flour, meal, or naval stores, and not less flour or meal than naval stores was to be shipped. The full amount of flour, meal, and naval stores was not shipped, other articles were; among them 2000 bushels of oats. A quarter of the latter weighed less, and

(*o*) *Warren* v. *Peabody*, 8 C. B. 800.
(*p*) 2 Stark. 450.
(*q*) *Capper* v. *Forster*, 3 B. N. C. 938.
(*r*) *Cockburn* v. *Alexander*, *ubi sup.*

occupied more room, than Indian corn. It was held that the owner was entitled to freight, as if the stipulated amount of flour, meal, and naval stores, in their respective portions, had been put on board, and the remainder of the space had been filled with grain, averaging 480 pounds to the quarter, and paying 11*s*. (*s*).

Evidence in reduction of damages.

Where there is an agreement for a specific freight, no evidence can be given of a deficient performance of contract not amounting to breach of condition precedent, with a view to reduce the damages; though it would be otherwise if the action were on a *quantum meruit*. For instance, evidence cannot be offered of a deviation which caused delay and expense (*t*). Nor of injury caused to the contents of some of the packages by the negligence of the master, in not ventilating them sufficiently (*u*). And where the freighter engages a ship for a certain time, the owner to keep her in repair, he cannot claim to deduct from the freight any time during which she is under repairs, and, therefore, lying idle (*x*). So, where there is an agreement to pay pilotage and port charges, for an entire voyage, and only part of the cargo is delivered, if this is received, the whole of the charges must be paid, and there can be no apportionment (*y*). [Nor can the value of missing goods be set off against the freight payable in respect of goods delivered (*z*).]

Actions for not supplying a cargo.

2. In actions for supplying no cargo, or an incomplete one, the measure of damage is the difference between what the plaintiff would have earned if the contract had been fulfilled, and that which he has earned, notwithstanding the breach (*a*).

The amount which he would have earned is open to the same

(*s*) *Warren* v. *Peabody*, 8 C. B. 800.

(*t*) *Bornmann* v. *Tooke*, 1 Camp. 377.

(*u*) *Davidson* v. *Gwynne*, 12 East, 381. [See *ante*, p. 93, n. (*i*). A set-off for culpable damage in an action for freight is allowed in some of the United States, though not in our country; *Dakin* v. *Oxley*, 15 C. B. N. S. at p. 667; 33 L. J. C. P. at p. 120, per Willes, J., citing 1 Parson's Mercantile Law, 172 n. If the damage amounts to absolute destruction, the shipowners are not ready to deliver, and therefore cannot sue for freight; *Duthie* v. *Hilton*, L. R. 4 C. P. 138.]

(*x*) *Harelock* v. *Geddes*, 10 East, 555; *Ripley* v. *Scaife*, 5 B. & C. 167.

(*y*) *Christy* v. *Row*, 1 Taunt. 300.

[(*z*) *Meyer* v. *Dresser*, 16 C. B. N. S. 646; 33 L. J. C. P. 289.]

(*a*) *Hunter* v. *Fry*, 2 B. & A. 421, 424, *et seq.* [In calculating net earnings, the expenses must be deducted; *Smith* v. *McGuire*, 3 H. & N. 554; 27 L. J. Ex. 465.]

questions, and decided upon the same principles, as the amount of freight payable (*b*). Upon this point, Maule, J., says, in *Cockburn* v. *Alexander* (*c*), "It may be that in cases of this sort, different amounts might, under different states of circumstances, be the proper measure of damage." "If you could show that there were goods which the charterer might have obtained, then the proper measure of damages would be the non-shipment of that cargo. But if there were none, it may be that in ascertaining the damage an average is to be taken of all kinds of goods. It is in that way I think that Lord Tenterden arrived at the opinion he expressed in *Thomas* v. *Clarke*, viz., that where there is no cargo at all to be had, the average is to be taken of all possible kinds of cargo; that is, that you are to assume, contrary to the fact, that there are goods of each of the kinds enumerated, because the obtaining goods of any one kind, where none are in truth obtained, cannot *à priori* be considered as more probable than the obtaining of any of the others." But, whatever may be the default made by the charterer, the captain is still bound to do his best to obtain freight, and where *after* breach by the defendant he has refused an offer, the measure of damages is what the charterer ought to have paid, minus what the owner might have got. But he is not bound to accept any offer before the final breach by the defendant (*d*).

Where the charter-party allows the freighter to load several different species of goods *alternatively*, he may fill up the load with any he pleases, though in the way least beneficial to the owner, provided he does not exceed the limits specified, if any. Of course, if he does exceed those limits, he may pay as if the cargo in excess was of a nature permitted. Covenant to take on board a full cargo of copper, tallow, and hides, or other goods, but not more than 50 tons of copper and tallow, nor

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(*b*) See as to cases where a scale of freight is fixed for certain articles which are not actually carried, or not to the stipulated extent, *Thomas* v. *Clarke*, 2 Stark. 450, and *ante*, p. 209.

(*c*) 6 C. B. 814.

(*d*) *Harries* v. *Edmonds*, 1 C. & K. 686, *per* Parke, B. [In *Smith* v. *McGuire*, *ubi supra*, Martin, B., declined to say that the captain was bound to look for employment for his ship, though whatever the ship did earn the defendant would be entitled to have deducted. It has been said that if the captain's conduct has been unreasonable, the jury may diminish the damages on that account; *Wilson* v. *Hicks*, 26 L. J. Ex. 242.]

more than 15 tons of copper; covenant to furnish a full cargo of copper, tallow, and hides, or other goods, as above mentioned at certain rates. Defendant provided a quantity of tallow, and as much hides as the vessel could carry, but no copper. In consequence, she had to keep in her ballast, the place of which might have been supplied by the copper, and lost so much freight, for which the action was brought. Lord Ellenborough said, "The parties very likely intended that copper should necessarily form a part of the cargo, but they have not said so. The covenant leaves a latitude to the freighter to furnish a cargo of 'copper, tallow, hides, *or other goods*.' Therefore, if the ship had as large a quantity of tallow and hides as she could take on board, I think the covenant has been performed" (*e*). It will be observed that the plaintiff sought to obtain not only a full cargo, which he had, but something more, viz., to turn the ballast, which is generally waste weight, into productive freight. Now, as Tindal, C. J., remarked in *Irving* v. *Clegg* (*f*), "it is the duty of the owner to find proper ballast for the ship." And any agreement which would have the effect of transferring this obligation to the charterer would be interpreted very strictly. In the last-named case it was agreed that the freighter should ship a full cargo of certain specified goods: "100 tons of rice or sugar to be shipped previous to any other part of the loading, to ballast the vessel." The 100 tons were shipped, but were not sufficient for ballast, and the owner had to take on board 36 tons of stones. It was held that the freighter had done his duty in loading the 100 tons; that the agreement with regard to them was for the benefit of the owner in ensuring him a freight for what would otherwise be unproductive, but that except so far as the special agreement extended, it left his obligation to find ballast just as it was at first (*g*).

Evidence of custom.

If there is a known and recognised custom of loading, at the

(*e*) *Moorsom* v. *Page*, 4 Camp. 103.

(*f*) 1 B. N. C. 53.

(*g*) 1 B. N. C. 53, 58. [And see *Southampton Steam Colliery Co.* v. *Clarke*, L. R. 4 Ex. 73; 38 L. J. Ex. 54; affirmed in Ex. Ch. L. R. 6 Ex. 53; 40 L. J. Ex. 8. Whether in addition to the cargo the charterer is bound to fill up with broken stowage, depends on the terms of the charter-party; *Cole* v. *Meek*, 15 C. B. N. S. 795; 33 L. J. C. P. 183; *Duckett* v. *Satterfield*, L. R. 3 C. P. 227; 37 L. J. C. P. 144.]

port to which the charter-party refers, this custom will, according to the well-known rule of evidence (*h*), be incorporated in the contract, and, if departed from, to the loss of the owner, damages will be estimated accordingly (*i*). Accordingly, where, by the practice of the port, cotton bales for exportation were always compressed by machinery, the furnishing a cargo of uncompressed cotton bales was held not to be a compliance with the contract to load a full cargo. The same charter-party gave the freighter an option either to load the whole ship with cotton at a high freight, or part of it with cotton, and the remainder with rice at a lower freight. The latter, if loaded at all, would have to be put on board first. It was held that by beginning to load with cotton, the freighter had elected to furnish a full cargo of it, and that damages for not supplying such a cargo must be estimated at the higher freight (*k*).

Right of charterer who has not supplied a cargo to be allowed for freight earned afterwards.

Sometimes there is a stipulation that in case the charterer cannot find a cargo, he shall pay a certain sum, and in such cases questions often arise as to his right to be allowed for freight subsequently earned by the ship. It would appear from the cases, that where the right of the ship-owner to the sum specified has once absolutely vested, he may earn as much as he can, and retain it, over and above the payment from the charterer. A ship was freighted for a voyage to Petersburg and back at so much per ton measurement. She was to bring a single cargo of lead out, and to bring home a return cargo. If from political circumstances she should remain forty days at Petersburgh without *the outward cargo being unloaded, and consequently without the return cargo being loaded*, the captain was to return to England, and be paid a gross sum, which was less than the money payable per ton. The cargo could not be unloaded, and the captain returned as agreed, bringing back the lead, but on his way home he obtained further freight, and earned money:—Held that he was entitled to retain it. On the whole construction of the charter-party it was considered to amount to an alternative agreement, either to load a return cargo, and pay so much per ton, or to pay a

(*h*) Tayl. Ev. 767. [See p. 1009, *et seq*, 6th ed.]
(*i*) *Wallace* v. *Small*, cited 1 B. N. C. 55.
(*k*) *Benson* v. *Schneider*, 7 Taunt. 272. [And see *Buckle* v. *Knoop*, *ante*, p. 209.]

gross sum for the conveyance of the lead to Petersburg and back again. In the latter event there was no reason why the captain should not earn what else he could by taking other people's goods on board for his own benefit (*l*). On the other hand, where, under a similar state of things, the master, instead of bringing the goods home, sold them at Stockholm, and brought home another cargo, upon which he earned freight, it was held that the amount so earned must be deducted from the amount payable by the freighters (*m*). With regard to this case, Mansfield, C. J., says (*n*), "For aught that appears the means which the captain had of obtaining any freight at Stockholm might arise from the use he made of the lead there; and on that account perhaps the Court of King's Bench might think that the captain, who had not been authorised, or directed, to act thus, but had done all this for his own benefit, should not be entitled to that profit, leaving the underwriters to pay the whole 2500*l*." Should such a case recur, the question will probably be, whether the captain was bound to bring back the cargo, as it seems to have been assumed in the above cases he was. If so, any money earned by not bringing it home would clearly be earned for the benefit of the freighters, if they chose to ratify his act. If, however, there was nothing to prevent him putting the goods on shore, or throwing them overboard, unless received from him, it is hard to see what difference it could make as to the freight of the goods substituted, that they had been sold instead of cast away.

Where charterer has not become liable to pay penalty.

If, however, the freighters have not followed the agreement in such a manner as to entitle themselves to pay the stipulated sum in full discharge of all damage, their case will return to the ordinary rules, and while they on the one hand may become liable to pay more than that sum, so the owners may be entitled to demand less. The defendants chartered a ship to New Zealand, and it was agreed that they were to load her there, or by their agent to give notice that they abandoned the adventure, in which case they were to pay 500*l*. On the ship's arrival there was no agent of theirs, either to supply a

(*l*) *Bell* v. *Puller*, 2 Taunt. 285.
(*m*) *Puller* v. *Staniforth*, 11 East, 232.
(*n*) 2 Taunt. 300.

cargo, or to abandon the adventure. The captain waited the prescribed time, and then went in search of freight, and ultimately obtained a cargo far more remunerative than that which the defendants were bound to supply. He claimed to retain the freight and to recover the 500*l.* also. It was held, however,—1st, that if the defendants had given due notice of abandonment, their obligation to pay the 500*l.* would have become absolute, and that while the plaintiff could have recovered no more, whatever his loss had been, they could have claimed no reduction on account of his gains. 2ndly, that as no notice of abandonment had been given, their right to close the transaction by payment of 500*l.* had never attached, nor on the other hand the right of the plaintiff to demand this sum. Therefore the contract remained as if there had never been such a stipulation. If the plaintiff had lost more than 500*l.* he might have recovered more; but as he had in fact lost nothing, he was only entitled to nominal damages for the breach of contract (*o*).

If the charterer himself consents to the owner's making any profit of his ship, as, for instance, by taking an intermediate trip between the outward and homeward voyage, no claim to a reduction of freight can be set up on this account, even though the result of the indulgence may be that higher freight is payable by the defendant (*p*).

Actions for breach of contract to employ, probably seldom, if ever, occur in the case of carriers by land. The principles upon which the damage would be assessed in such a case are too obvious to require comment.

Dangerous goods.

[There is an implied undertaking on the part of shippers of goods on board a general ship that they will not, without giving notice, ship packages of a dangerous nature, which the servants of the shipowner may not, on inspection, be reasonably expected to know to be of a dangerous nature. In case of such a shipment causing damage, the shipowner must compensate the shippers of other goods sustaining damage, and will have a remedy against the shipper of the goods which have caused the calamity (*q*). And so if personal injury is caused to

(*o*) *Staniforth* v. *Lyall*, 7 Bingh. 169.
(*p*) *Wiggins* v. *Johnston*, 14 M. & W. 609.
[(*q*) *Brass* v. *Maitland*, 6 E. & B. 470, 483; 26 L. J. Q. B. 49. The

the carrier or his servants, and it is the probable consequence of not giving notice, the sender is responsible (*r*). By 29 & 30 Vict. c. 69, carriers may refuse to receive goods declared to be specially dangerous, and penalties are imposed on persons sending them without notice.]

II. Actions against carriers.

Actions against carriers for not taking goods.

1. Damages against the owner of the ship for not taking a cargo are regulated, on exactly the same principles as those against the freighter for not supplying it, by the amount of damages actually and necessarily incurred (*s*). If the freighter could not procure any other ship, the damages would of course be measured by the injury suffered, from having his cargo left on his hands; bearing, however, in mind, that in all such cases the damages suffered must be such as the contracting parties were led to contemplate (*t*). If another ship could be procured, the damages would be measured by the increased rate of freight payable (*u*), and if such freight was in fact less than that contracted for, the damages would of course be merely nominal for breach of contract. In all cases, however, the damages must be the necessary and immediate consequence of the breach committed. A ship's husband covenanted to load brandy on board a ship, and proceed with it to Madeira, and the merchant covenanted to pay freight for it there, and load it with a full cargo home. The merchant arranged at Madeira to barter the brandy which he expected for fruit, which was to form the cargo home. No brandy arrived, in consequence of which he was unable to procure a cargo. The ship's husband sued and recovered against him for not supplying cargo. He then sued the ship's husband for not bringing the brandy, laying as special damage that by reason of his not doing so, plaintiff had been unable to procure a return cargo, and in this way he claimed to recover the amount paid in the former action and its costs. It was held that such damage was too remote, and Tindal, C. J., said, "If I contract to

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shipper's duty was, by Crompton, J., limited to the obligation to take proper care not to deliver dangerous goods without notice.]

[(*r*) *Farrant* v. *Barnes*, 11 C. B. N. S. 553; 31 L. J. C. P. 137.]

(*s*) *Hunter* v. *Fry*, 2 B. & A. 421, 427; *Walton* v. *Fothergill*, 7 C. & P. 392.

(*t*) *Hadley* v. *Baxendale*, 9 Exch. 341; 23 L. J. Ex. 179.

[(*u*) *Higginson* v. *Weld*, 80 Mass., 165.]

transfer stock and do not, the party with whom I contracted has no right to tell me a month afterwards that if I had transferred the stock he could have bought an estate with the money. There was a case of a man who brought an action against the keeper of a ferry-boat for refusing to carry him across a river, in consequence of which he sustained loss by not being able to keep an appointment. But it was held that he could not recover damages on any such ground" (*x*).

If, however, the plaintiff, in order to perform a contract, is forced to buy other goods at an increased price, in consequence of the non-arrival of those which the defendant had contracted to bring, this, it seems, is such a natural result of the defendant's neglect as to entitle him to recover his loss (*y*).

Effect of notice in cases of special damage.

In most questions of special damage, it is very important to inquire what notice the defendant had received of the effect which might result from his breach of contract. The plaintiff sent goods by rail, which he intended to sell at the B. market on Saturday, and which ought to have arrived in time for it. No notice, however, of this desire was given to the defendants. On Saturday the plaintiff's clerk went down to B. to look after them. They did not arrive till Monday, in consequence of which he removed them to N., and sold them there. The question was, whether the expense of removal, and of his wages and expenses while absent on this duty, were recoverable. Pollock, C. B., told the jury they were at liberty to give these expenses as damages if they liked. The jury gave them, and on motion for new trial it was held, 1st, that it was a question for the jury, not for the judge, whether these expenses were the reasonable consequences of the breach of contract, and that whether any particular class of expenses is reasonable or not, depends upon the usage of the trade, and various other circumstances. 2nd, that if the carriers had distinct notice that the goods would be required to be delivered at a particular time, they would, perhaps, have been liable for these expenses; but that otherwise they would not be. 3rd, that under the circumstances these expenses

(*x*) *Walton* v. *Fothergill*, 7 C. & P. 394.
(*y*) *Walton* v *Fothergill*, *ubi sup.*

were unreasonable and the damages excessive (*z*). But with great deference it may be submitted, whether the question, as it appears to have been left to the jury, did not involve matter of law as well as matter of fact, and whether upon the question so left they could have found differently. The defendant's liability to loss or expense arising out of the non-delivery of goods, or any other act connected with the discharge of his duty, depends upon the answer to two questions: 1st, was that loss or expense the reasonable result of the existing state of facts? 2nd, did the defendant contemplate and contract to guard against such a state of facts? If both these questions are answered in the affirmative, he is of course liable. In the case under consideration the facts were that goods were to be sold at a particular market, that they were too late for it, and that they could only be sold with profit at some distant place. The jury found, no doubt properly, that the expenses incurred under these circumstances were proper and reasonable. But the most important question was, whether the defendants had ever contemplated or contracted to guard against this state of facts. It seems quite clear they had not; and if so, it may be suggested whether the learned judge ought not to have told them that there was no evidence upon which they could find affirmatively in answer to the latter question. If, then, one of two necessary premises was negatived, it would seem that it became a matter of law to direct them that the conclusion sought for by the plaintiff could not be drawn. The judgment in *Hadley* v. *Baxendale* (*a*) seems in favour of the view which is here offered (*b*).

(*z*) *Black* v. *Baxendale*, 1 Exch. 410.

(*a*) 9 Exch. 341; 23 L. J. Ex. 179.

(*b*) See further as to remoteness of damages, *Hadley* v. *Baxendale*, and *Watson* v. *Ambergate Ry. Co.*, 15 Jur. 448, which have been stated and discussed already at such length, pp. 9, 30, as to make it only necessary to refer to them now. [Also *Hales* v. *London and N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J. Q. B. 292, where expenses incurred in inquiring for goods were held recoverable, but not loss of hire caused by their not arriving by the day for which they were hired; *G. W. Ry. Co.* v. *Redmayne*, L. R. 1 C. P. 329; where loss of profit on sale by reason of the goods being delayed till after the plaintiff's traveller had left, was held too remote; *Crouch* v. *G. N. Ry. Co.*, 11 Ex. 742; 25 L. J. Ex. 137, as to loss of business from defendants refusing to carry the plaintiff's packed parcels; and as to delay in conveyance of passengers, *Hamlin* v. *G. N. Ry. Co.*, 1 H. & N. 408; 26 L. J. Ex. 20.]

[And accordingly in a very recent case where the plaintiff, a commercial traveller, sent a parcel of samples by luggage train from Oxford to Liverpool without informing the railway company what it contained or for what purpose it was required, and by the negligence of the company the delivery of the parcel was delayed, and the traveller spent three days at Liverpool unemployed waiting for it, Lush, J., directed the jury that the plaintiff could not recover his hotel expenses from the railway company, and the ruling was supported (*c*).]

Penalty.

Where the charter-party contains a penalty, which is not liquidated damages, a larger sum than the penalty may be obtained by suing, not for it, but for damages for the breach of contract (*d*).

Mode of calculating value of goods in actions for loss or injury to them.

2. The damages in actions for loss or injury of the goods are generally confined to the value of the articles lost. And it makes no difference that they have got into the hands of third parties who are also liable to the owner. In a very late case the defendants, a railway company, delivered the plaintiff's goods by mistake, not to the right consignee, but to J. S., who had been in the habit of receiving the plaintiff's goods as his factor. J. S. sold the goods, as he fancied he was authorised to do, and rendered an account of the sale to the plaintiff. He subsequently stopped payment. The plaintiff sued the defendants for the goods, and it was held that he was entitled to recover the amount for which they sold, and that he was not prejudiced by having tried to obtain the proceeds of the sale from J. S. This was no ratification of the defendants' act (*e*). The only question then will be as to the mode of estimating this value. [It will be in general the market value of the goods at the place and time at which they ought to have been delivered (*f*), independently of any circumstances peculiar to the plaintiff (*g*). If from the smallness of the place or the

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[(*c*) *Woodger* v. *G. W. Ry. Co.*, L. R. 2 C. P. 318; 36 L. J. C. P. 177.

(*d*) *Winter* v. *Trimmer*, 1 W. Bl. 395; *Harrison* v. *Wright*, 13 East, 343; *Maylam* v. *Norris*, 2 D. & L. 829.

(*e*) *Sanquer* v. *London and S. W. Ry. Co.*, 16 C. B. 163.

[(*f*) *Rice* v. *Baxendale*, 7 H. & N. 96; 30 L. J. Ex. 371; *Wilson* v. *Lancashire and Yorkshire Ry. Co.*, *ante*, p. 15; *Collard* v. *S. E. Ry. Co.*, *ante*, p. 15; *O'Hanlan* v. *G. W. Ry. Co.*, 6 B. & S. 484; 34 L. J. Q. B. 154.]

[(*g*) *G. W. Ry. Co.* v. *Redmayne*, L. R. 1 C. P. 329.]

scarcity of the article or other reasons there is no market price, the real value at the time and place must be ascertained, as a fact, by the jury, taking into consideration the circumstances which would otherwise have influenced the market price if there had been one, price at the place of manufacture, cost of carriage, and a reasonable sum for importer's profit (*h*).] In an action against shipowners for loss of goods, Lord Ellenborough said that the plaintiffs were entitled to recover the value of the goods on board at the time she was captured, by means of the deviation. That in the absence of any other evidence, that value could not be taken as more than the cost price and shipping charges, and that the insurance premium could not be added, as no new value was given to the goods by insuring them (*i*). Where, however, the cargo was conveyed to its proper destination, and there handed over to a person who was not entitled to it, it was decided that its value at the port of discharge was the proper measure of damages. Parke, J., said, "The plaintiffs are entitled to be put in the same situation as they would have been in, if the cargo had been delivered to their order at the time it was delivered to B.; and the sum it would have fetched at that time, is the amount of loss sustained by the non-performance of the defendant's contract" (*j*). Where no evidence at all can be given, the question of value must be resolved by the usual rules upon which presumptions of this sort are governed. If any evidence of value is withheld by the defendant, the goods, as against him, would be presumed to be of the highest value articles of that nature were capable of (*k*). Unless any such circumstances existed, the jury would, no doubt, as in a former case, be directed to give damages proportioned to what they might consider to be the fair and probable value of the articles in question (*l*); "and not to pare down the amount of damages, because the articles could not be distinctly proved." Where the plaintiff is not himself the owner of the goods, but has only a qualified property in them, he will be entitled to recover their whole value from the carrier, if he is himself liable for their

[(*h*) *O'Hanlan* v. *The G. W. Ry. Co.*, *supra*.]
(*i*) *Parker* v. *James*, 4 Camp. 112.
(*j*) *Brandt* v. *Bowlby*, 2 B. & Ad. 932, 939.
(*k*) *Armory* v. *Delamirie*, 1 Stra. 505.
(*l*) *Butler* v. *Basing*, 2 C. & P. 613.

value to the owner; and it is not necessary that he should have actually paid the owner (*m*).

Cases of special damage accruing from loss of goods, injury to them, or delay in their delivery, are governed by the principles laid down above.

The same question as to the mode of valuing goods that have been lost to the owner, often arises in a different way.

When goods have been sold for repair of ship.

It is the primary duty of the master of a ship, acting for the owner, to convey the cargo to its place of destination in the same ship, and in case of damage to repair it. To accomplish the latter object, he may, in cases of urgent necessity, sell the cargo, which is, in effect, borrowing from the shipper through the medium of a sale. Such a proceeding raises an implied contract of indemnity from the owner, for whose benefit the act was done, in favour of the shipper (*n*). The question then arises, at what value are the goods to be taken for the purpose of this indemnity? Where the ship has arrived, the owner is entitled to the amount which they would have fetched at the port of destination (*o*). If, however, the goods have actually been sold for a higher price than they would have been worth, if delivered, it does not seem quite settled whether the owner can claim this sum. In one case, where goods had been sold in this manner, Lord Ellenborough decided that the owner might deduct the sum which they had brought from the entire freight due (*p*). It does not appear, however, whether the owner lost or gained by taking this standard. In another case, where the selling price was decidedly higher than what they would have fetched at their destination, and an arbitrator adjudged the selling price to be due, the Court refused to set aside the award, saying it did not clearly appear that it was wrong. Holroyd, J., seemed inclined to think it was right. He said, "There is strong reason for contending that the owner of goods should receive a compensation for the goods sold according to their highest value. If the master could get money by other means, he had no right to sell; and if he had sold the goods, the owner ought to be

(*m*) *Crouch* v. *London and N. W. Ry. Co.*, 2 C. & K. 789.

(*n*) *Benson* v. *Duncan*, 1 Exch. 537; 3 Exch. 644.

(*o*) *Alers* v. *Tobin*, Abb. Ship. 372; [330, 11th ed.] *Hallett* v. *Wigram*, 9 C. B. 580.

(*p*) *Campbell* v. *Thompson*, 1 Stark. 490.

entitled to the actual proceeds, for the owner of the ship, in the event that has happened, ought not to be allowed to make any profit by such sale" (*q*).

Where the ship has never arrived at her destination, but has been lost since the sale, it is now settled that the goods cannot be taken at their price at a place which they never could have reached. It is not decided whether, in such a case, the owner would be liable at all (*r*). The foreign codes and jurists are at issue upon the point. Lord Tenterden, in his treatise (*s*), considers it to be the most reasonable doctrine that the money should only be payable in case of the safe arrival of the ship, as the merchant is not thereby placed in a worse situation than if his goods had not been sold, but had remained on board the ship. On the other hand, the shipowner is clearly in a better situation than if he had furnished the money himself, or it had been borrowed on his credit. It seems curious that a case so likely to occur in a mercantile country should never have been decided.

Liability of shipowners for loss caused by pilot;

The liability of shipowners for loss not attributable to their own default, has been restricted by statute in various cases. The Merchant Shipping Act, 1854 (*t*), s. 388, provides, that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot, acting in charge of such ship, within any district where the employment of such pilot is compulsory by law. This section will only protect the owner, &c., where the loss occurred wholly from the fault of the pilot; and if it was, [or may have been,] partly the fault of the master or crew, the liability continues (*u*). This clause differs from the corresponding section of 6 Geo. IV. c. 125, s. 55, which extended the immunity to cases where a pilot was acting in charge of the ship under any of the provisions of the act. Accordingly it was held, [under that section,] that the owner was not liable when the pilot was taken on board under circumstances which

(*q*) *Richardson* v. *Nourse*, 3 B. & A. 237.
(*r*) *Atkinson* v. *Stephens*, 7 Exch. 567.
(*s*) Abb. Ship. 372, [330, 11th ed.]
(*t*) 17 & 18 Vict. c. 104.
(*u*) [*The Iona*, L. R. 1 P. C. 426; *The Velasquez*, L. R. 1 P. C. 494; 4 Moo. P. C. N. S. 426; 36 L. J. Adm. 19; *The Ocean Wave*, L. R. 3 P. C. 205;] *Stuart* v. *Isemonger*, 4 Moo. P. C. 11; *Hammond* v. *Rogers*, 7 Moo. P. C. 170; *Rodrigues* v. *Melhuish*, 10 Ex. 110; 24 L. J. Ex. 26.

did not make it compulsory on the defendant to employ him, though he was bound to go, if required (*x*). [But under the Merchant Shipping Act, 1854, s. 388, the owners are responsible for the negligence of the pilot where they are not under compulsion to put him in charge of their vessel (*y*).]

or by fire;

or robbery in certain cases.

No owner of any sea-going ship, or share therein, shall be liable to make good any loss or damage that may happen, without his actual fault or privity, to any goods by reason of any fire on board; or to any gold, silver, diamonds, watches, jewels, or precious stones, by reason of any robbery or embezzlement, unless their nature and value has been inserted in the bills of lading or otherwise declared in writing to the master of the ship at the time of shipping (*z*).

But where the cause of action arises out of a wrongful sale of goods by the master of a ship, the whole value of the goods may be recovered in trover (*a*).

Limitation of liability for loss of life or personal injury.

[The Merchant Shipping Act Amendment Act, 1862, (25 & 26 Vict. c. 63,) s. 54, further provides that the owners of any ship, whether British or foreign, shall not, in cases where without their actual fault or privity, loss of life or personal injury is caused to any person, being carried in such ship; or damage or loss caused to goods, merchandise, or other things on board such ship; or where by reason of the improper navigation of such ship loss of life or personal injury is caused to any person carried in any other ship or boat, or loss or damage caused to any other ship or boat, or to goods, merchandise, or other things on board any other ship or boat, be answerable in damages, in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding 8*l.* for each

(*x*) *Lucey* v. *Ingram*, 6 M. & W. 302.

[(*y*) *The Lion*, L. R. 2 P. C. 525; *The Stettin*, Br. & Lush. 199. The pilot need not be compulsorily employed at the spot where the accident happens, if he has been compulsorily employed within the district where it happens; *General Steam Nav. Co.* v. *British and Colonial Steam Nav. Co.*, L. R. 4 Ex. 238; 38 L. J. Ex. 97; in Ex. Ch.]

(*z*) 17 & 18 Vict. c. 104, s. 503.

(*a*) *Morris* v. *Robinson*, 3 B. & C. 196, 205.

ton of the ship's tonnage. The tonnage is to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine room; and a mode of ascertaining the tonnage of foreign ships is prescribed (*b*).]

The costs of recovering compensation, either by suit against the owners, or by process against the ship, may be recovered beyond this extent (*c*).

Under the section which requires the value of certain articles to be stated, it has been held that if the shipment is made in a foreign country, it will be sufficient to state their value at that place in the coin of the realm. But Lord Abinger, C. B., doubted strongly whether the act applied at all to shipments made from a port which is not governed by the law of England. At most, he said, the statute could only apply where the shipment was made to England (*d*).

None of the clauses above cited extend to small craft, lighters, boats, gabbets, &c., concerned in inland navigation (*e*). Nor does the immunity from loss by fire protect against losses arising from a fire on board a public lighter employed by shipowners in transporting cargo to a ship, which would itself be within the statute (*f*).

[(*b*) Under the repealed sections of the former Act, 17 & 18 Vict. c. 104, ss. 504, 505, the shipowner's liability was restricted to the value of ship and freight, to be taken in case of loss of life or personal injury, at not less than 15*l.* per registered ton. By s. 506, which is still in force, the owner is liable for loss and injury arising on distinct occasions, to the same extent as if no other loss or injury had arisen. As to the power of the Court of Admiralty over freight since the Act of 1862, see *The Orpheus*, L. R. 3 A. & E. 308; 40 L. J. Adm. 24. 25 & 26 Vict. c. 63, has operation on the high seas, and applies both to British and foreign ships; *The Amalia*, 32 L. J. Adm. 191. It may be mentioned here that Lord Campbell's Act (9 & 10 Vict. c. 93), was held to extend to a case where the person in respect of whose death damages were sought was an alien, and at the time of the collision causing death, was on board a foreign vessel on the high seas; *The Explorer*, L. R. 3 A. & E. 289. The Court of Admiralty has no jurisdiction over suits for personal injury resulting in death; *Smith* v. *Brown*, L. R. 6 Q. B. 729; 40 L. J. Q. B. 214. By the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104), s. 512, no action can be brought in case of loss of life, or personal injury, against the owner of a ship, until the Board of Trade has held an inquiry or refused to do so.]

(*c*) *Exparte Rayne*, 1 Q. B. 982.

(*d*) *Gibbs* v. *Potter*, 10 M. & W. 70; [decided on 26 Geo. III. c. 86, s. 3, similar in terms to 17 & 18 Vict. c. 104, s. 503. Such a description of goods as "one box, containing about 248 ounces of gold dust," is not a declaration of the true nature and value; *Williams* v. *African Steam Ship Company*, 1 H. & N. 300; 26 L. J. Ex. 69.]

(*e*) *Hunter* v. *M'Gown*, 1 Bligh, 580.

(*f*) *Morewood* v. *Pollok*, 1 E. & B. 743; 22 L. J. Q. B. 250.

Liability of land carriers at common law.

The legislature has also interfered in the case of carriers by land. The great extent of their liability at common law, which was held to amount to a contract of insurance upon goods entrusted to them, had naturally caused an effort on their part to reduce it. This they used to do by notices, in the shape of advertisements, handbills, placards in their offices, and so forth, stating that they would not be liable for any property beyond a certain value, unless paid for at an extra rate when delivered. This amounted to a special contract, binding on the owner of the goods, when brought home to his knowledge. It fell short of their intention, however, in two respects. In the first place it was absolutely necessary to show that the notice had come to the knowledge of the plaintiff (*g*), though no proof of an agreement to it on his part was required (*h*). In the next place it was decided, that even a notice with which the plaintiff was proved to be acquainted, would not protect the defendant, when the loss occurred from any act amounting either to a misfeasance and utter renunciation of his character as carrier, or even to what the Courts termed "gross negligence" (*i*).

Carriers' Act.

To remedy this state of things the Carriers' Act (*k*) was passed. It enacts (*l*) that no common carrier by land (*m*), for hire, shall be liable for the loss or injury to any gold or silver, whether manufactured, unmanufactured, or in coin, precious stones, jewellery, watches, clocks, time-pieces, trinkets (*n*), bills, bank-notes, orders, notes or securities for payment of money (*o*), stamps, maps, writings, title-deeds, paint-

(*g*) *Kerr* v. *Willan*, 6 M. & S. 150; *Walker* v. *Jackson*, 10 M. & W. 161.

(*h*) *Nicholson* v. *Willan*, 5 East, 507; *Mayhew* v. *Eames*, 3 B. & C. 601.

(*i*) *Birkett* v. *Willan*, 2 B. & A. 356; *Garnett* v. *Willan*, 5 B. & A. 53; *Sleat* v. *Fagg*, *ibid.*, 342; *Owen* v. *Burnett*, 2 C. & M. 353; *Lowe* v. *Booth*, 13 Price, 329.

(*k*) 11 Geo. IV. and 1 W. IV. c. 68.

(*l*) S. 1.

[(*m*) A contract to carry partly by land and partly by sea is divisible, and as to the land journey, the carrier is protected; *Le Couteur* v. *London and S. W. Ry. Co.*, 6 B. & S. 961; L. R. 1 Q. B. 54; 35 L. J. Q. B. 40; *Pianciani* v. *Same*, 18 C. B. 226.]

(*n*) A gold chain used for an eye-glass held not to be a trinket; *Davey* v. *Mason*, Car. & M. 45; [but it has since been held that articles of use or necessity, such as shirt-pins, bracelets, brooches, portemonnaies, or smelling-bottles, if so much ornament is superadded as to make their main object ornament, are trinkets; *Bernstein* v. *Baxendale*, 6 C. B. N. S. 251; 28 L. J. C. P. 265.]

(*o*) Where an instrument was lost, bearing a bill of exchange stamp, and

ings, engravings, pictures (*p*), gold or silver plate or plated articles, glass, china, silks, manufactured or unmanufactured, wrought up with other materials or not (*q*), furs (*r*), or lace (*s*), contained in any parcel, when the value exceeds 10*l.*, unless its value has been declared (*t*), and an increased charge paid at the time of the delivery. A notice of such increased rate of charges, fixed in the office in legible characters, is to bind all parties sending parcels, without proof of their knowledge (*u*). But the carrier will not be entitled to the benefit of the Act, unless such notice is affixed, or in case of his refusal to give a receipt for the parcel insured (*x*). The common law liability of carriers for articles not enumerated above cannot be limited by a mere notice (*y*), but it may by a special contract. The extra costs of insurance may be recovered as damages in an action for loss or injury to goods (*z*). On the other hand, the declared value will not be conclusive against the carrier as to

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drawn in the following form, "Three months after date pay to me the sum of 11*l.* 10*s.* value received. To Mr. C., &c." And written across it was an acceptance by C. The parcel containing the instrument was addressed to A., a creditor of C., with the intention that A. should put his name to it as drawer. Held that it was not a bill, as it had neither drawer nor payee, nor a note as it contained no promise to pay. That it was a "writing," but not of any value at the time of delivery, as no one but A. had power to complete it; *Stoessiger* v. *S. E. Ry. Co.*, 3 E. & B. 549; 23 L. J. Q. B. 293.

[(*p*) Where a picture is framed, the frame, as forming part of the picture, is within the Act; *Henderson* v. *London and N. W. Ry. Co.*, L. R. 5 Ex. 90. In a previous case, where a packing-case containing a lace design, in a gilt frame covered with glass, was lost on its way to an ecclesiastical art exhibition, the owner, though the lace came within the Act, was allowed to recover the value of the frame and the packing-case, the frame being considered not a constituent part of the lace design, and the packing-case being accessory to the frame as much as to the lace; *Treadwin* v. *G. E. Ry. Co.*, L. R. 3 C. P. 308; 37 L. J. C. P. 83.]

(*q*) [Lord Abinger ruled that] silk dresses made up for wear were not within the Act; *Davey* v. *Mason*, Car. & M. 45; [but this must now be considered as overruled; see *Bernstein* v. *Baxendale*, 6 C. B. N. S. 251; 28 L. J. C. P. 265, where silk guards were held to come within the Act; and *Brunt* v. *Midland Ry. Co.*, 2 H. & C. 889; 33 L. J. Ex. 187, where the same was held of elastic silk webbing. So *Flowers* v. *S. E. Ry. Co.*, 16 L. T. N. S. 329; W. N. 1867, p. 155.]

(*r*) Hat bodies, composed partly of the soft substance taken from the skin of rabbits, partly of the wool of sheep, were held not within this section; *Mayhew* v. *Nelson*, 6 C. & P. 58.

[(*s*) By 28 & 29 Vict. c. 94, s. 1, this is to be construed as not including machine-made lace.]

[(*t*) As to what is not a sufficient declaration of value, see *ante*, p. 225, note (*d*).]

(*u*) S. 2.

(*x*) S. 3.

(*y*) S 4.

(*z*) S. 7.

its real worth (*a*). The Act does not protect the carrier from liability to answer for losses or injury arising from the felonious acts of any servant in his employ; nor does it protect the servant from liability on account of his own neglect or misconduct (*b*). [Therefore where goods, within the terms of the Act, and not insured, have been lost by felony of a servant, it is sufficient, in answer to a plea setting up notice of an extra charge which was not paid, to reply the felony without averring negligence. "Under the statute felony by a servant is a sufficient answer to the defence set up by the carrier, and negligence has nothing to do with it; and, on the other hand, under the carrier's notice negligence is the sole question, felony is immaterial" (*c*).] Where there has been a special contract in sufficiently wide terms, no negligence, however gross, will make the defendant liable (*d*). [The fact of goods being received by a common carrier, under a special contract, does not deprive him of the protection of the Act, unless the terms of the contract are such as to be inconsistent with the goods having been received by him in his capacity of a common carrier (*e*).]

Special contract.

Provisions of Railway and Canal Traffic Act, 1854.

The length to which the decisions upon this point had gone, caused the Legislature to interfere. Accordingly it is provided by 17 & 18 Vict. c. 31, s. 7 (*f*), that every notice, condition, or

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(*a*) S. 9.

(*b*) S. 8.

[(*c*) *G. W. Ry. Co.* v. *Rimell*, 18 C. B. at p. 585; 27 L. J. C. P. 201; *per* Jervis, C. J., explaining *Butt* v. *G. W. Ry. Co.*, 11 C. B. 140; 20 L. J. C. P. 241; so *Treadwin* v. *G. E. Ry. Co.*, L. R. 3 C. P. at p. 310, *per* Willes, J. The felony must be brought home to the carrier's servants, and it is not sufficient to show that some one must have stolen the goods; *Metcalf* v. *London, B. & S. C. Ry. Co.*, 4 C. B. N. S. at p. 311; 27 L. J. C. P. 333.]

(*d*) *Austin* v. *Manchester Ry. Co.*, 10 C. B. 454; *Carr* v. *Lancashire Ry. Co.*, 7 Exch. 707; *Morville* v. *G. N. Ry. Co.*, 21 L. J. Q. B. 319; [*Peck* v. *North Staffordshire Ry. Co.*, 10 H. L. C. at p. 494; 32 L. J. Q. B. at p. 250, *per* Blackburn, J. For examples of contracts held not to relieve from liability to make good loss arising from excepted perils, where caused by the carrier's negligence, see *Phillips* v. *Clark*, 2 C. B. N. S. 156; 26 L. J. C. P. 168; *Martin* v. *Great Indian Peninsula Ry. Co.*, L. R. 3 Ex. 9; 37 L. J. Ex. 27; *Czech* v. *Gen. Steam Navigation Co.*, L. R. 3 C. P. 14; 37 L. J. C. P. 3. As to what constitutes a special contract, see *Anderson* v. *Chester and Holyhead Ry. Co.*, 4 Ir. C. L. R. 435.]

[(*e*) *Baxendale* v. *G. E. Ry. Co.*, L. R. 4 Q. B. 244; 38 L. J. Q. B. 137, in Ex. Ch.]

[(*f*) Extended, so far as applicable, to traffic carried on by railway companies in steam vessels by the Railway Clauses Act, 1863; 26 & 27 Vict. c. 92, s. 31. By the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 14,

declaration by which any railway or canal company shall limit its liability for loss caused by its own neglect or default, shall be void, unless deemed to be reasonable by the Court or judge before whom any question relating thereto is tried. They are only to be liable, however, to the extent of 50*l.* for a horse, 15*l.* for neat cattle, and 2*l.* for pigs and sheep, unless they have been paid for on an additional value. Proof of value is to rest upon the owner. All special contracts must be signed by the party to be bound by them. Nothing in this Act is to affect the privileges of the company under 11 Geo. IV. and 1 Will. IV. c. 68, as to articles enumerated in it.

[Upon 17 & 18 Vict. c. 31, s. 7, it has been decided that the conditions capable of being imposed by railway companies in limitation of their liability as common carriers, must not only be in the opinion of a Court or judge just and reasonable, but must also be embodied in a special contract in writing, signed by the owner or sender of the goods (*g*). The railway company cannot set up the want of a signature, the proviso only applying to cases where the railway company is claiming exemption from liability by reason of there being a special contract, in which case the other party is not to be bound by a contract which he or the person delivering the goods has

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a railway company contracting to carry, partly by railway and partly by sea, may limit their liability during sea transit by a condition conspicuously published at their booking-office, and printed on the receipt or freight note.]

[(*g*) *M'Manus* v. *Lancashire, &c., Ry. Co.*, 4 H. & N. 327; 28 L. J. Ex. 353, in Ex. Ch.; *Peek* v. *North Staffordshire Ry. Co.*, 10 H. L C. 473; 32 L. J. Q. B. 241; *per* Lord Westbury, C., and Lord Wensleydale. *Simons* v. *G. W. Ry. Co.*, 18 C. B. 805; 26 L. J. C. P. 25. The numerous cases in which conditions have been held reasonable or unreasonable, will be found collected in the note to *Coggs* v. *Bernard*, 1 Smith's Leading Cases at pp. 215 *et seq.*, 6th ed. No better general rule has been laid down than that stated in the opinion of Blackburn, J., in Dom. Proc. (*Peek* v. *North Staffordshire Ry. Co.*, 10 H. L. C. at p. 511; 32 L. J. Q. B. 252), that a condition exempting carriers wholly from liability for the neglect and default of their servants, is *primâ facie* unreasonable; but if the carrier is willing to carry for a reasonable remuneration, but at the same time offers in the alternative to carry on the terms that he shall have no liability at all, and holds forth as an inducement a reduction of the price below that which would be reasonable remuneration for carrying at carrier's risk, or some additional advantage which he is not bound to give and does not give to those who employ him with a common-law liability, the condition may be reasonable. (See, in addition, *Rooth* v. *N. E. Ry. Co.*, L. R. 2 Ex. 173; 36 L. J. Ex. 83.) In *Harrison* v. *London, B. and S. C. Ry. Co.*, 2 B. & S. 122; 31 L. J. Q. B. 113, Erle, C. J., and Keating, J., held that the operation of the section was confined to losses caused by misconduct on the part of the railway company, and not to losses occurring through pure accident; but the judgment of the Court was not given upon this point.]

not signed (*h*). The statute expressly applies to injuries done in the "receiving, forwarding and delivery," therefore where a horse brought into a railway company's station yard for the purpose of being sent by train, was, before any contract for carriage had been made, injured by the sharp edge of some girders left there through the negligence of the company's servants, the company were held protected from liability for any greater damages than 50*l.*, although the usual practice at the station was that a ticket should be got after the horse had been put into a horse-box (*i*). But the Act only extends to the traffic on a company's own lines, and not to a contract exempting a company from loss on a railway not belonging to or worked by them (*k*). The statute does not apply to articles deposited in the railway company's cloak-room, because the company do not receive them in the capacity of carriers (*l*).]

Meaning of word "loss."

The word "loss" in 11 Geo. IV. and 1 Will. IV. c. 68, only refers to cases where the chattel is either abstracted or otherwise lost from the personal care of the carrier, or from the place where it ought to be, and by reason of such loss is incapable of being delivered at the proper time. It does not protect the carrier in all cases where the owner of the article suffers damage from the neglect of the defendant to carry. Therefore, where the declaration stated that, through the negligence of the defendants, his luggage was delayed a long time, during which he was deprived of its use, a plea which merely alleged the fact of a notice being affixed, and no declaration of the value of the goods in question, which were above 10*l.*, was held bad. It should have gone on to allege such a loss as is described above (*m*).

Value must be declared in the first instance.

The declaration of value must be made in the first instance by the sender of the goods, whether they are delivered at the office of the carrier, or at the sender's house, or on the road, or elsewhere. In no case can the sender recover, unless he has taken the step which the legislature intended he should take in the first instance (*n*). [And he must make the declaration

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[(*h*) *Baxendale* v. *G. E. Ry. Co.*, L. R. 4 Q. B. 244; 38 L. J. Q. B. 137.]
[(*i*) *Hodgman* v. *West Midland Ry. Co.*, 5 B. & S. 173; 33 L. J. Q. B. 233; affirmed in Ex. Ch. 6 B. & S. 560; 35 L. J. Q. B. 85.]
[(*k*) *Zunz* v. *S. E. Ry. Co.*, L. R. 4 Q. B. 539; 38 L. J. Q. B. 209.]
[(*l*) *Van Toll* v. *S. E. Ry. Co.*, 12 C. B. N. S. 75; 31 L. J. C. P. 241.]
(*m*) *Hearn* v. *S. W. Ry. Co.*, 10 Ex. 793; 24 L. J. Exch. 180.
(*n*) *Hart* v. *Baxendale*, in Cam. Scacc. 6 Exch. 769.

with the intention that it shall be understood as a declaration of value, and for the purpose of insurance (*o*). But when he has declared the value it is for the carrier to demand the increased rate to which he may be entitled, and if he does not do so and the ordinary rate is paid, he is not protected by the statute from his ordinary common law liability in case of loss or injury happening to the goods during the journey (*p*).]

Fraud in concealing value.

Even in cases not within the protection of the Act, the plaintiff cannot recover the value of the article, if he has used fraud in concealing its character (*q*). [Upon the same principle, if he makes an untrue statement of the value, upon which the contract between himself and the carrier is based, he is not at liberty afterwards to deny the truth of the statement and show that the real value was greater (*r*).] Where the contract is to carry a particular species of goods, such as passenger's luggage, the carrier is not responsible for injury to a perfectly different species, such as merchandise, which he may happen to be carrying with him, and which the plaintiff, even without fraud, procures to be carried, without their being apprised of its nature (*s*). If, however, the defendants, with full notice of its character, choose to treat it as luggage, they will be responsible for its loss (*t*).

[(*o*) *Robinson* v. *London and S. W. Ry. Co.*, 19 C. B. N. S. 51; 34 L. J. C. P. 234; decided upon 17 & 18 Vict. c. 31, s. 7.]

[(*p*) *Behrens* v. *G. N. Ry. Co.*, 7 H. & N. 950; 31 L. J. Ex. 299, in Ex. Ch.]

(*q*) *Gibbon* v. *Paynton*, 4 Burr. 2298; *Batson* v. *Donovan*, 4 B. & A. 21; *Walker* v. *Jackson*, 10 M. & W. 161.

[(*r*) *M'Cance* v. *London and N. W. Ry. Co.*, 3 H. & C. 343; 34 L. J. Ex. 39, in Ex. Ch.]

[(*s*) *Belfast and Ballymena Ry. Co.* v. *Keys*, 9 H. L. C. 556.]

(*t*) *G. N. Ry. Co.* v. *Shepherd*, 8 Exch. 30; and see as to amount of notice, *Boys* v. *Pink*, 8 C. & P. 361. [The mere fact that a package looks like merchandise and is marked "glass," is not enough to fix the carrier with responsibility; *Cahill* v. *London and N. W. Ry. Co.*, 10 C. B. N. S. 154; 30 L. J. C. P. 289; affirmed in Ex. Ch. 13 C. B. N. S. 818; 31 L. J. C. P. 271. It has been held that pencil sketches do not form part of the ordinary luggage of an artist; *Mytton* v. *Midland Ry. Co.*, 4 H. & N. 615; 28 L. J. Ex. 385; nor title-deeds to be produced at a trial, nor bank notes for the expenses of a trial, the ordinary luggage of an attorney; *Phelps* v. *London and N. W. Ry. Co.*, 19 C. B. N. S. 321; 34 L. J. C. P. 259; nor a rocking-horse that of a father going home to his children; *Hudston* v. *Midland Ry. Co.*, L. R. 4 Q. B. 366; 38 L. J. Q. B. 213; but in a very recent case it has been said that ordinary personal luggage must be construed relatively to the habits and wants of different classes of travellers, and thus may include the gun-case or fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of a student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying; *Macrow* v. *G. W. Ry. Co.*, L. R. 6 Q. B. 612; 40 L. J. Q. B. 300. Where a servant took with him the luggage of his master

Telegraphic messages.

[The character in which Electric Telegraph Companies receive and undertake to forward messages, and their responsibility for loss occasioned by error or delay in transmission, have of late years given rise to much discussion, especially in America, where most conflicting opinions have been expressed. In England the Court of Queen's Bench, after considering the American cases which were brought to their notice, have refused to recognise any analogy between the consignment of goods through a carrier and the transmission of a telegram. They accordingly held that the message having been sent by the sender on his own account, and not as agent for the person to whom it was addressed, there was no privity between the latter and the company, and that he could not be said to have any property in the message any more than he would have had if it had been sent orally by the servant of the sender, and that the obligation of the company to use due care and skill in transmission was one arising entirely out of the contract between them and the sender (*u*). The telegraph companies in general limit their responsibility by special conditions, which by some of their incorporating Acts must be reasonable (*x*). Under the Telegraph Acts, 1868, 1869 (*y*), telegraphic messages are now carried by the Postmaster-General, who is not a common carrier, nor responsible for the neglect or misconduct of his inferior officers (*z*). Nor is the sender responsible for mistakes made in transmission, the Post Office authorities being only his agents to transmit the message in the terms in which he delivered it (*a*).]

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who was coming by a later train, the company were held not responsible; *Becher* v. *G. E. Ry. Co.*, L. R. 5 Q. B. 241; 39 L. J. Q. B. 122.]

[(*u*) *Playford* v. *United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706; 38 L. J. Q. B. 249.]

[(*x*) A condition that the company would not be responsible for unrepeated messages, has been held reasonable; *MacAndrew* v. *Electric Telegraph Co.*, 17 C. B. 3; 25 L. J. C. P. 26.]

[(*y*) 31 & 32 Vict. c. 110, and 32 & 33 Vict. c. 73.]

[(*z*) *Lane* v. *Cotton*, 1 Ld. Raymond, 646; *Whitfield* v. *Lord Despencer*, 2 Cowper, 754. The principal American cases will be found referred to in c. 30 of Shearman and Redfield on the Law of Negligence (the authors of which work still maintain the opinion that telegraph companies are common carriers of messages), and in a note to the 4th edition of Sedgwick on Damages, p. 413 (1868). It would seem that the same rules respecting remoteness of damage should be applied as in the case of other contracts; and in *Landsberger* v. *Magnetic Telegraph Co.*, 32 Barb. 530, the supreme court of New York acted upon the rule laid down in *Hadley* v *Baxendale*, and *Griffin* v. *Colver*, 16 N. Y. 494. So *Stevenson* v. *Montreal Telegraph Co.*, 16 Up. Canada Q.B. 530.]

[(*a*) *Henkel* v. *Pape*, L. R. 6 Ex. 7; 40 L. J. Ex. 15.]

CHAPTER XI.

CONTRACTS OF SURETYSHIP.

I. Guaranties.

1. *Actions by Principal Creditor against the Surety.*
2. *Actions by the Surety against the Principal Debtor.*
3. *Actions by the Surety against his Co-surety.*

II. Policies of Insurance.

1. *Life Insurance.*
2. *Fire Insurance.*
3. *Maritime Insurance.*

III. General Average.

THE liabilities discussed in the previous chapters were all of a direct nature, arising from the immediate dealings of the parties with each other. In the present chapter I shall examine a number of collateral liabilities, which spring from a contract by one person to guard the other against the acts or default of some other party or agent. Under this branch of the subject fall the four well-known heads of Life, Fire, and Marine Insurance, and General Average, as also the ordinary cases of guaranty and indemnity. It will be more convenient to take the latter first, as embodying the general principles by which the former are regulated.

I. A contract of guaranty or indemnity, involves the rights of three persons,—the principal creditor, the principal debtor, and the surety. The action may be by the principal creditor against his immediate debtor, which of course is no way affected by the fact of the guaranty; or by the same party against the surety; or by the surety against the principal debtor, or against his co-sureties, if he is fortunate enough to have any.

1. Actions by the principal creditor against the surety. Damages in this action are of course the amount of the debt

In actions against surety,

owing to the plaintiff, or of the loss incurred by him, to the extent to which the defendant has consented to be answerable for it; and where the debt bears interest, as a bill, the surety will be liable for the interest also (*a*).

plaintiff must prove a loss

The plaintiff must prove strictly the amount to which he has been injured. Where the plaintiff was surety for a collector of taxes, with an indemnity, and sued the party indemnifying him, assigning as a breach, that the collector had received money, which he had not paid over, in consequence of which plaintiff had been forced to pay it, the defendant admitted the receipt of the money by the collector, but not its amount; it was held that the plaintiff could only recover nominal damages, unless he could show what sums had actually been received by the collector, and that judgment signed against him for 500*l.*, at the suit of the Receiver General, was no evidence of the amount of this damage, as the defendant was not a party to it, and it might have been obtained by collusion (*b*). So where the defendant had covenanted that the debts of a certain firm, into which the plaintiff was about to be admitted as a partner, did not exceed a specified sum, and that if they did, the defendant would pay on demand of the plaintiff the amount by which they exceeded that sum, this was held not to be a covenant for liquidated damages, but a contract to indemnify the plaintiff from any loss he might suffer from an erroneous statement of the debts, and that it was for the jury to consider to what extent his position had been altered by reason of the defendant's breach of covenant (*c*).

arising from a cause insured against.

The plaintiff must prove not only the amount of his loss, but also that it arose from the cause against which the surety agreed to protect him. The plaintiff and S. entered into a contract that S. should perform certain works at a fixed sum, receiving from time to time payment for three-fourths of the work done; the remaining one-fourth to be paid a month after the completion of the whole; if S. should fail to complete the

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(*a*) *Ackermann* v. *Ehrensperger*, 16 M. & W. 99.

(*b*) *King* v. *Norman*, 4 C. B. 884; [In *Greville* v. *Gunn*, 4 Ir. C. L. Rep. 201, sureties for a land agent undertaking that he should duly account to his principal, were held liable for the taxed costs of a cause petition to compel him to do so.]

(*c*) *Walker* v. *Broadhurst*, 8 Exch. 889; *Ex parte Broadhurst*, 2 De G. Mac. & G. 953.

works, the plaintiff was to employ others, and deduct the expense from the sum payable to him. Defendant was surety for the performance of this contract by S. S. abandoned the contract when partly performed. The plaintiff at the request of S. had advanced him a sum which exceeded the whole cost of the works then accomplished, but was less than the whole contract price. Plaintiff then had the works completed, at a cost which, added to the price of the work actually done, was less than the contract price; but added to the money which he had advanced was more than that sum. He sued defendant on his guaranty, and it was held that he was only entitled to nominal damages, as the loss had arisen from his own act in advancing more money than he ought to have done, not from the refusal of S. to go on with the works (*d*). It was also held in the same case, that this defence was properly set up in mitigation of damages, under *non est factum*, and could not have been pleaded; defendant could not have pleaded performance, because the contract was broken; nor that the obligee was damnified by his own wrong, because this was not a damnification of that sort, but one not arising on the contract at all.

In case of bankruptcy, dividend must be apportioned to whole debt.

Where a debtor, whose whole debt is covered by a guaranty, becomes bankrupt, and a dividend is received, the creditor can of course only recover the balance from the surety. Where, however, only a portion of the debt is so secured, the creditor cannot apply the dividend to the unsecured portion, and recover the whole of the residue from the surety. The latter has a right to have the dividend applied rateably to the whole debt, and a proportionate deduction made from the amount for which he is liable. And so, if the difference between his liability and the entire debt is covered by the guaranty of another person, each surety may claim a rateable deduction, out of each pound of the amount of debt to which their respective guaranties extend. The plaintiff cannot apply the whole of the dividends to either part of the demand at his own election, and thus vary, at his own pleasure, the extent of the responsibility of the two sureties (*e*).

(*d*) *Warre* v. *Calvert*, 7 A. & E. 143; and see *Tanner* v. *Woolmer*, 8 Exch. 482.

(*e*) *Bardwell* v. *Lydall*, 7 Bingh. 489; *Raikes* v. *Todd*, 8 A. & E. 846; [*Gee* v. *Pack*, 33 L. J. Q. B. 49; *Thornton* v. *McKewan*, 1 H. & M. 525; 32 L. J. Ch. 69.]

Damages when promise to do a thing is absolute.

Some distinctions must be observed as to the time at which a loss occurs, so as to entitle a plaintiff to sue and obtain substantial damages. Where the defendant's promise is an absolute one to do a particular thing, as to discharge or acquit the plaintiff from such a bond, an action may be brought the moment he has failed to perform his contract, and a plea of *non damnificatus* would be bad (*f*). Therefore where a party entered into a covenant to pay off incumbrances on an estate by a particular day (*g*), to take up a note (*h*), it was held that an action might be brought, and damages to the extent of the incumbrances and note respectively might be obtained, though no actual injury had been sustained (*i*).

When promise is to indemnify.

Where the covenant is to indemnify or save harmless, no action can be brought till some loss has arisen; so it is also where the covenant is to acquit from damage by reason of a bond or some particular thing; and in either case the proper plea is *non damnificatus* (*k*). The question then will be, what was the loss against which the plaintiff was to be secured?

(*f*) 1 Wms. Saund. 117, *a*, n. 1; [1 Wms. Notes to Saund. 134.]

(*g*) *Lethbridge* v. *Mytton*, 2 B. & Ad. 772; [*Redfield* v. *Haight*, 27 Connecticut, 31.]

(*h*) *Loosemore* v. *Radford*, 9 M. & W. 657.

[(*i*) So where the defendant's promise was to be answerable for all the costs, damages, and expenses, which the plaintiff might sustain by reason of his trying an action against a third person commenced at the defendant's request, it was held that costs for which the plaintiff was liable to his attorney might be recovered, although unpaid, the court treating the promise as an engagement to find the money, and not merely to indemnify—not merely to repay, but to take care that the plaintiff should not be called on to pay; *Spark* v. *Heslop*, 1 E. & E. 563; 28 L. J. Q. B. 197; distinguished on this ground from *Collinge* v. *Heywood*, *post*, p. 237. In a recent case the plaintiff, devisee of an estate, conveyed it to the defendant, subject to payment of a legacy of 200*l.* to A. B. on attaining twenty-one, or to his personal representative, on his death under age, the defendant covenanting to pay the legacy accordingly, and to indemnify the plaintiff against all liability consequent on non-payment. A. B. died under age, and his administrator filed a bill against the plaintiff to enforce payment, but the plaintiff being advised that on the true construction of the will, the legacy, on the death of A. B., ceased to be a charge on the estate, resisted the claim, and the bill was dismissed. The plaintiff then claimed the 200*l.* from the defendant, and sued him for breach of covenant, and was held entitled to recover the whole 200*l.*; *Hodgson* v. *Wood*, 2 H. & C. 649; 33 L. J. Ex. 76. A case of substantial damages recovered for breach of a covenant to do all things necessary to corroborate a deed of appointment, or at the expiration of six months to pay the full value of the interest intended to be vested in the covenantee by the deed of appointment, without any proof of actual damage, will be found in *Crommelin* v. *Donegall*, 3 Ir. C. L. R. 434.]

(*k*) 1 Wms. Saund. 117, n. 1. [1 Wms. Notes to Saund. 134, n. (1).]

When the plaintiff at the request of the defendant prosecuted an action of replevin, on receiving an undertaking to indemnify him from the said distress, actions, costs, damages, and expenses, which are now, or may be hereafter, commenced or otherwise incurred by reason of the claim of the distraining party; he incurred costs in the replevin suit, and *his own attorney* delivered him a bill on account of them; it was held that he was not damnified till he had paid the bill, though it would have been otherwise, if the agreement had been, in terms, to indemnify when the bill should be delivered (*l*). Here it is plain that the mere delivery of a bill by a man's own attorney, which he might not be bound to pay at all, or not to its full extent, was no injury to the plaintiff. What amounts to a loss.

And where the contract was to indemnify and save harmless the plaintiffs against all sums of money, costs and expenses, which they should pay and incur by reason of becoming bail for the defendant, it was held that the bond would not be forfeited by the mere commencement of an action against the plaintiffs upon their bail-bond, but that if the defendant, after notice, did not immediately take upon himself the defence of the suit, but let them pay the expense of it as it went on, this was a damnification, and that the right of action arose when any such payment was made (*m*).

It has been laid down in some old cases that liability to a suit is a sufficient damnification, even before any suit has been commenced; as for instance, where the defendant suffered a prisoner to escape after promising to save plaintiff harmless against all escapes (*n*); and Lord Coke says, that terror of suit, so as to be a hindrance to business, is a sufficient damnification (*o*), probably referring to the chance of an arrest on mesne process. This, however, is clearly not law now, since it has been decided that the actual existence of a suit which is still pending is no damnification; none as to the subject matter of the action, because the defendant may ultimately succeed; Liability to suit. Action pending.

(*l*) *Collinge* v. *Heywood*, 9 A. & E. 633, overruling *Bullock* v. *Lloyd*, 2 C. & P. 119, and affirmed 3 Exch. 738; [compare *Spark* v. *Heslop*, *ante*, p. 236, note (*i*).]

(*m*) *Sparkes* v. *Martindale*, 8 East, 593.

(*n*) *Barkly* v. *Kempstow*, Cro. Eliz. 123.

(*o*) 5 Rep. 24.

nor as to costs already incurred but not paid, because they are incident to the substantive claim (*p*).

Judgment recovered.

But judgment actually recovered against a party is always a damnification to the full amount for which it is given, even though payment has not been made under it. The defendant had agreed to save harmless his co-trustee, the plaintiff, from any claim which might arise out of the plaintiff's permitting him to use a legacy of 10,000*l.*, instead of investing it in the way they were bound to do. A bill was filed against them by the cestuis que trustent, the result of which was that plaintiff was ordered to invest the 10,000*l.* An action was brought on the indemnity, before the money had been invested:—Held that the amount of damages was the amount to which the making of the claim subjected the plaintiff, which was the sum to be invested, and the actual loss which had been subsequently added to that sum, in consequence of the claim having been enforced by law (*q*). The Court seemed to distinguish this case from those cited above, on the ground that in them the contract was to indemnify against a payment, whereas here it was to indemnify against a claim. In a later case, however, the same decision was given, where the indemnity did not contain the word claim. The plaintiff, who was a lessee under covenants, assigned to the defendant, taking an indemnity against all "costs, damages, and expenses which he might incur" from breach of those covenants by the assignee. The assignee did commit breaches, for which plaintiff was sued by his lessor, and judgment recovered against him by default, and it was held that he might recover the amount of the damages and the costs of the judgment by default, in an action on the indemnity, though he had not paid them himself (*r*). The true distinction then would appear to be, between cases where the liability is finally fixed on the plaintiff, in such a way that it may be enforced at once, and cases in which there is only a liability to be liable.

The same rule was laid down in another case, where, although judgment had been obtained against the plaintiff, he had not

(*p*) *Taylor* v. *Young*, 8 Taunt. 315; 3 B. & A. 521.
(*q*) *Warwick* v. *Richardson*, 10 M. & W. 284.
(*r*) *Smith* v. *Howell*, 6 Exch. 730. [See also *Harrap* v. *Armitage*, 12 Price, 441.]

paid, and might never be called on to pay its amount. The declaration set out an indenture, by which, after recital that defendant had agreed to pay all debts of J. W., defendant covenanted to protect and indemnify J. W., his heirs, &c., from the payment of the said debts, and from all actions, claims, and demands for any of them. The defendant omitted to pay an annuity, which became forfeited after the death of J. W., and judgment was had against the plaintiff, administratrix, for 20*l.* assets in hand, and residue *quando acciderint.* The Court held that the plaintiff was entitled to recover the whole amount of the judgment, since, at all events, the deed amounted to an express covenant to pay the debts, within the decision of *Lethbridge* v. *Mytton* (*ante* p. 236). Patteson, J., however, said that a sufficient breach of the covenant to protect was alleged, when the plaintiff stated that the defendant did not protect the covenantees, and by reason thereof an action was brought, and judgment recovered against the administratrix, to the extent of all the assets she had. That upon this ground the plaintiff was entitled to the whole sum claimed; the only argument to the contrary being, that if she recovered it she might not make a proper use of it. Parke, J., inclined to the same opinion; Littledale, J., dubitante (*s*). It may be observed that in this case, Patteson, J., took a distinction between a covenant to indemnify, and one to protect; but the two previous decisions give the former word all the efficacy which he ascribed to the latter.

A general indemnity only extends to the lawful acts of others.

There is a distinction as to the species of damage to which a contract of indemnity extends. When the agreement is a general one to indemnify against all persons, this is but a covenant to indemnify against lawful title; and the reason is because, as it regards such actions as may arise from a rightful claim, a man may well be supposed to covenant against the world (*t*). Therefore, if the obligee be sued unjustly, either because he is sued before the money is due, or otherwise; or if the bond in which he is bound be against law and void, and he suffer himself to be unjustly vexed thereupon, it seems there is no breach of the condition of the bond to save harm-

(*s*) *Carr* v. *Roberts*, 5 B. & Ad. 78.
(*t*) *Per* Lord Ellenborough, *Nash* v. *Palmer*, 5 M. & S. 374.

less (*u*). So a covenant by assignee of a lease to indemnify against rent due from the assignor to the lessor, is not broken by an illegal distress made by the latter (*v*). And on the same principle, where the plaintiff consented to become member of a provisional committee, on receiving an indemnity "against all personal responsibility; and all costs, charges, and expenses which had been, or might be incurred in and about the formation of the company, their meetings, advertisements, surveys, and other expenses of carrying out the company, applying for an Act of Parliament, or anything relating thereto;" and he was sued unsuccessfully by the advertising agent; it was held that the extra costs incurred by the plaintiff in his defence could not be recovered against the present defendant in an action on the indemnity. The Court seemed to consider that costs of this nature did not come within the terms of the indemnity at all. Cresswell, J., said, "He has not been made personally liable to any such thing. R. tried to impose such a liability upon him, but failed." "I am of opinion that the covenant to indemnify in this case must be construed in the ordinary way—to indemnify the plaintiff against all *lawful* claims" (*w*).

Otherwise when an individual is specified.

On the other hand, where a person covenants to save harmless from all acts of a particular person, there he is bound to indemnify against the acts of that person, whether by title or not; for then the covenantor is presumed to know the person against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against any disturbance by him, whether by lawful title or otherwise (*x*).

Actions by assignor against assignee.

Where a lessee assigns his lease, it is optional with the lessor, or assignee of the reversion, either to sue the lessee on his original covenants, or to sue the assignee of the term on the covenants as running with the land (*y*). In such a case it is usual with the assignee of the term to covenant with the

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(*u*) Shepp. Touch. 390.

(*v*) 1 Roll. Abr. 433, pl. 10; *Perry* v. *Edwards*, 1 Stra. 400.

(*w*) *Lewis* v. *Smith*, 9 C. B. 610.

(*x*) 2 Wms. Saund. 178, n. (*c*); [2 Wms. Notes to Saund. 526, n. (*c*);] *Nash* v. *Palmer*, *ubi sup.*; [and so where the indemnity is against actions brought in respect of any particular matter, as, for example, a distress for rent, the covenantor may be liable though the action be groundless; *Ibbett* v. *Le la Salle*, *ante*, pp. 57, 58.]

(*y*) 1 Sm. L. C. 22, and notes. [45, 6th ed.]

assignor to perform all the covenants in the original lease,—and to indemnify him against all suits brought by the lessor or his assignee in consequence of their non-performance. Where, however, the lessee has assigned the term by deed-poll, subject to the payment of the rent and performance of the covenants in the original lease (*z*); or even by indenture in the same words and without express covenants (*a*); the assignee cannot be sued by the assignor in covenant (*b*). But he may be sued in case or in assumpsit (*c*). The reason is, that as the lessee is liable in the nature of a surety as between himself and the assignee for the performance of the covenants during the continuance of the interest of the assignee, a duty is imposed upon the latter at common law to perform the covenants during that time (*d*). It may be observed that the language of Baron Parke just quoted, the arguments of Holroyd, J. (*e*), and the express opinion of Lord Denman (*f*), go to show that this action would be equally maintainable whether the words "subject to the performance of the covenants, &c.," were used or not. [And it has now been formally decided by the Court of Exchequer, adopting the opinion of Lord Denman, that there is an implied promise on the part of each successive assignee of a lease to indemnify the original lessee against breaches of covenant committed by each assignee during the continuance of his own term; and such promise will be implied though each assignee expressly covenants to indemnify his immediate assignee against all subsequent breaches (*g*).]

Damages in such a case would be measured by the loss which the plaintiff had sustained. Where there is an express indemnity against breach of covenants, he may recover the costs of an action brought against him by his lessor, the proper course, if he has no defence, being to let judgment go by default, and have the damages proved on the writ of

(*z*) *Burnett* v. *Lynch*, 5 B. & C. 589.
(*a*) *Wolveridge* v. *Steward*, 1 C. & M. 644.
(*b*) 5 B. & C. 602—609; 1 C. & M. 644.
(*c*) *Ibid.* *Marzetti* v. *Williams*, 1 B. & Ad. 424.
(*d*) *Per* Parke, B., 7 M. & W. 530.
(*e*) 5 B. & C. 606.
(*f*) 1 C. & M. 660.
[(*g*) *Moule* v. *Garrett*, L. R. 5 Ex. 132; 39 L. J. Ex. 69; affirmed L. R. 7 Ex. 101; 41 L. J. Ex. 62.]

inquiry (*h*). The same rule would seem to hold good where the action is brought upon the implied indemnity raised by the law (*i*).

Actions by lessee against sub-lessee.

But the landlord cannot sue the under-lessee for any breach of covenants contained in the original lease to his own tenant (*k*). Therefore, the original lessee cannot be regarded as a surety for the performance by the under-lessee of covenants by which he is not bound. Consequently, if the latter enters into covenants precisely similar to those contained in the original lease, these merely constitute an absolute promise to do what he engages, and not a contract of indemnity against any loss the lessee may suffer from their breach. And it makes no difference that there is no right of entry reserved by which the lessee may ascertain whether the covenants have been executed or not. Hence, if he is sued by his lessor for breach of covenant, he can only, in an action against the under-lessee, recover in respect of *his* breach of covenant, and cannot obtain the costs of defending the former action (*l*).

Sureties on a replevin bond.

The sureties on a replevin bond are together only liable to the value of the goods seized, if less than the rent in arrear, or the amount of rent, if they are worth more, together with the costs of the replevin suit, (not exceeding in all the amount of the penalty,) and the costs of the action against them (*m*). On payment of this sum, and the costs of the application, the Court will stay proceedings on the bond (*n*). They are not liable for rent subsequently fallen due (*o*).

Sureties for a sheriff's bailiff.

Where the sureties for a sheriff's bailiff covenanted to indemnify the sheriff against the costs of defending any action, and of prosecuting or opposing any motion in or application to the court concerning any matter wherein the bailiff should act, or assume to act, as bailiff to the said sheriff; it was held that this covenant extended to actions

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(*h*) *Smith* v. *Howell*, 6 Exch. 730.

[(*i*) Held *contrà*, however, in Ireland, but without discussion; *Hopkins* v. *Murray*, 12 Ir. L. R. 359.]

(*k*) *Holford* v. *Hatch*, Doug. 182.

(*l*) *Penley* v. *Watts*, 7 M. & W. 601; *Walker* v. *Hatton*, 10 M. & W. 249; *Logan* v. *Hall*, 4 C. B. 598, overruling *Neale* v. *Wyllie*, 3 B. & C. 533; and see *ante*, p. 55.

(*m*) *Hefford* v. *Alger*, 1 Taunt. 218; *Hunt* v. *Round*, 2 Dowl. 558.

(*n*) *Miers* v. *Lockwood*, 9 Dowl. 975.

(*o*) *Ward* v. *Henley*, 1 Y. & J. 285.

brought against the sheriff for acts done properly by the bailiff in the discharge of his duty (*p*); and that he might recover the costs of an action for a false return, which he had defended as well as he could, though it had failed on account of the non-production of evidence which was in his power to bring forward. Also, that under the terms of the above covenant the costs of an application to postpone the trial against him until another trial involving the matter in dispute had come on might be recovered (*q*).

Right to compromise.

A party sued on a cause of action, against which he is indemnified, is not bound to resist if he has no defence. He may make the best compromise he can, and then recover the loss which he has incurred. Trustees lent trust money to the defendant, and took an indemnity from him in case it should turn out the loan was not justified. A bill was filed against them to invest the money they had lent. They called on the defendant to come in and resist the suit. On his refusal they consented to a decision of the Court being at once taken as to the propriety of their conduct in lending the money without carrying on the suit in the regular form. The decision was against them, and they brought their action upon the indemnity. It was held that the plaintiffs' claim upon the indemnity was unaffected by the summary method they had pursued, since it did not appear that the decision could be in any degree affected by the stage of the cause in which it was pronounced; or that the plaintiffs, by incurring the expense of prosecuting the suit to the hearing, could have made any defence; or have diminished the damage consequent upon an adverse decision; or that the decree pronounced was less binding upon the plaintiffs, or more prejudicial to the defendant, than it would have been if made at the ordinary period of the suit (*r*). In such a case, the onus of showing that the compromise was a disadvantageous one lies upon the defendant, and it is not necessary to give the surety notice of the first action. But if notice is given to him, and he refuse to defend the action, in consequence of which the person indemnified is obliged to

(*p*) *Farebrother* v. *Worsley*, 1 C. & J. 549.
(*q*) *Ibid.*, 5 C. & P. 102.
(*r*) *Lord Newborough* v. *Schröder*, 7 C. B. 342, 399.

yield to the demand, that is equivalent to a judgment, and estops the surety from saying that the defendant in the first action was not bound to pay the debt (*s*).

Action against principal by surety

2. Actions by the surety against the principal debtor.

Damages in these actions are governed by exactly the same rules as those which we have been considering, since the principal debtor is under an implied obligation to indemnify his surety. The same distinctions also hold good as to the time at which the action may be brought. This may differ, according as the indemnity is an express or only an implied one.

who has taken a security.

Where a surety takes a bond from his principal for the amount of the debt which he has guaranteed, he may sue upon it on the day assigned in the bond, even though he has made no payment as surety, and the time at which he could be called upon as surety has not arrived (*t*). And in such a case he must sue upon the bond, and cannot sue in assumpsit for money paid *after* he has been forced to pay (*u*). But if the bond were merely a bond of indemnity, he must prove actual damage (*v*).

By surety who has no security.

In the case, however, of a mere surety, who has taken no security from his principal, no debt arises from the principal till a payment has been made by the surety (*w*); even though the surety has been called on for payment (*x*). But in equity, as soon as he is under actual liability, he may demand to be exonerated (*y*).

At law, the moment he has paid any part of the debt, he may sue his principal, and as often as he makes a payment his right to sue accrues (*z*). But where a party who is surety for another can only protect himself from action at suit of a third party by paying money at a particular day he may do so,

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(*s*) *Duffield* v. *Scott*, 3 T. R. 374; *Jones* v. *Williams*, 7 M. & W. 493; *Smith* v. *Compton*, 3 B. & Ad. 407; *Farebrother* v. *Worsley*, 5 C. & P. 102. As to costs of the first action, see *ante*, p. 57.

(*t*) *Toussaint* v. *Martinnant*, 2 T. R. 100.

(*u*) *Ibid.*

(*v*) *Penny* v. *Foy*, 8 B. & C. 13.

(*w*) *Taylor* v. *Mills*, Cowp. 525.

(*x*) *Paul* v. *Jones*, 1 T. R. 599.

(*y*) *Nisbet* v. *Smith*, 2 Bro. C. C. 579; *Lee* v. *Rook*, Mos. 318; *Cock* v. *Ravie*, 6 Ves. 283.

(*z*) *Davies* v. *Humphreys*, 6 M. & W. 153.

and before demand, and then sue his principal for the amount so paid (*a*).

What amounts to payment by the surety.

The form of action by surety against principal is assumpsit for money paid to his use. An important question then arises, what may be considered as money for this purpose? Where the plaintiff was security for the defendant who became insolvent, upon which the plaintiff being called on for the money gave his note of hand payable with interest, Lord Kenyon held that the creditor having consented to take the note from the plaintiff, it was as payment to them of the money due by the defendant; it was payment of money to his use, and the action was maintainable. And the Court, on motion for a new trial, agreed with this decision (*b*). The American Courts hold the same rule in all cases in which the note has been given and accepted by the creditor as full payment and in complete satisfaction (*c*). In England, however, the point seems by no means settled. It has been twice decided that giving a bond does not enable a party to maintain an action for money paid, even when it has been accepted as payment and satisfaction of the old debt (*d*). In the first case Lord Ellenborough said, "There is no pretence for considering the giving this new security as so much money paid for the defendant's use. Supposing even the case of a note or bill of exchange, as the current representative of money, to have been rightly decided, still this security, consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money." In the latter case, Bayley, J., said, "The plaintiff in this case has paid no money. It is said, indeed, that he has given what is equivalent to it, and that it ought to be considered for this purpose as money, and so it was held in *Barclay* v. *Gooch*. But in *Taylor* v. *Higgins*, the Court, having the former case before them, held that the action for money paid could not be maintained. There are, therefore, at all events conflicting authorities on this point, the last of which is in favour of the defendant; then, as the authorities

Giving a note.

Bond.

(*a*) *Broughton's Case*, 5 Rep. 24.
(*b*) *Barclay* v. *Gooch*, 2 Esp. 571.
(*c*) Sedg. Dam. 323. [359, 4th ed.]
(*d*) *Taylor* v. *Higgins*, 3 East, 169; *Maxwell* v. *Jameson*, 2 B. & A. 51.

differ, it becomes necessary to look at the reason of the thing. No money has yet come out of the plaintiff's pocket, and non constat that any ever will; for if he recovers from the defendant in the present action, he may never pay it over to B." On the other hand *Barclay* v. *Gooch* was cited with approbation by the Court of Exchequer in a recent case (*e*), where they seemed disposed to relax from the severity of former decisions—[and it has since been discussed and upheld by the Court of Exchequer in Ireland (*f*).]

Where a party, liable for another, pays money to save his goods from being taken in execution, this will of course support an action for money paid to the use of the other party (*g*).

Goods taken in execution.

But where the goods were actually taken and sold under a distress for rent, it was held that this action would not lie, because, upon the sale, the money vested in the landlord as an instantaneous executed satisfaction of the rent, and never was the money of the tenant at all (*h*). However, in *Rodgers* v. *Maw* (*i*), where the goods of a surety had been taken in execution for the debt of the principal, the Court of Exchequer, without deciding the point, seemed strongly of opinion that the amount for which they sold might be set off as money paid. They pointed out that a writ of *fi. fa.* directs the sheriff to make "so much money" of the defendant's goods, and said, "We cannot see upon what principle a man may not set off money paid by the produce of his goods, as well as money paid indirectly (*j*) without any sale of his goods." They expressed a twofold doubt as to the application of *Moore* v. *Pyrke* to the case under discussion, and as to the principle of that decision, and postponed the case that the defendant might put the question upon the record, with a view to a writ of error, which, however, was not done. No final decision was given.

Transfer of stock.

It has also been held that a transfer of stock does not support a count for money paid (*k*).

(*e*) *Rodgers* v. *Maw*, 15 M. & W. 444, 449.
[(*f*) *M'Kenna* v. *Harnett*, 13 Ir. L. R. 206.]
(*g*) *Exall* v. *Partridge*, 8 T. R. 308.
(*h*) *Moore* v. *Pyrke*, 11 East, 52; and see *Yates* v. *Eastwood*, 6 Exch. 805.
(*i*) *Ubi sup.*
(*j*) *Sic.*; qy. directly?
(*k*) *Nightingal* v. *Devisme*, 5 Burr. 2589; *Jones* v. *Brinley*, 1 East, 1.

In America the Courts hold that the giving of a mortgage is not payment, nor even taking possession of the estate for the purpose of foreclosure, since the land is still only a security for the money (*l*); but where the equity of redemption has been released, and the conveyance of the land was received in discharge of the debt due from the plaintiff, they hold that it should be considered the same thing as if the plaintiff had actually paid the money. The creditor received it as money, or as an equivalent for money. To the principal debtor it was immaterial whether the payment was made in one way or the other (*m*). It has been decided in several states, that in such a case the plaintiff must prove that the thing received, whether a chattel or land, was of the full value of the debt, or agreed to be received as such (*n*). **Mortgage.**

In an action on a covenant of indemnity by a surety, who has been compelled to pay money for his principal, the jury may give interest as damages. The damages ought to indemnify, and the surety has been damnified by losing the interest of the money he has paid. Such a case differs from that of direct contracts to pay a sum of money, upon which no interest is given at common law, because there the intention of the parties is presumed to be expressed in the terms of the contract. And the rate of interest which the principal himself had allowed, in stating an account with the surety, was held to be the proper basis of calculation (*o*). **Interest.**

In an action by bail against their principal, the former may recover all expenses incurred in rendering up the latter. In a case of this sort Lord Ellenborough said, "The relation of principal and bail is this,—the principal engages to indemnify the bail from all expenses fairly arising from his situation as bail. I think the indemnity goes against all charges which are necessary to secure themselves. The bail have a right to surrender the principal in their own discharge, and for their own security. If, therefore, the principal abscond, so that he **Action by bail.**

(*l*) *West* v. *Chamberlin*, 8 Pick. 336.
(*m*) *Ainslie* v. *Wilson*, 7 Cow. 662.
(*n*) *Bonney* v. *Seely*, 2 Wend. 481; *Howe* v. *Mackay*, 5 Pick. 44.
(*o*) *Petre* v. *Duncombe*, 20 L. J. Q. B. 242; 2 L. M. & P. 107; [and see *Hitchman* v. *Stewart*, *post*, p. 249.]

cannot be had, the bail may take every proper and necessary step to secure him." Where however the bail employed an agent to find the principal, and then refused to pay him, and was sued, it was held that he could not recover against his principal the costs incurred in defending the action (*p*). But no damages can be recovered by bail in respect of his trouble or loss of time in taking a journey to become bail. Because he does this, not as a person employed by the defendant, but as a friend through motives of kindness (*q*). [Where a defendant, removing an indictment by certiorari, gives bail for his appearance and for the payment of the costs, a contract on his part will be implied to indemnify the bail against the prosecutor's costs. An express or implied contract to indemnify the bail against the consequences of the defendant's not appearing would probably be contrary to public policy, inasmuch as it would be giving the public the security of only one person instead of two (*r*).]

When surety may sue co-surety, and for what.

3. Action by surety against co-surety.

This action does not arise till it appears that one surety has paid more than his proportion of what the sureties can ever be called upon to pay, and then it only lies for the surplus. Thus if the surety has paid less than his aliquot portion of the debt, and the principal has then paid the residue, the right of action against the co-surety will not run from the payment by the surety, but from the payment by the principal, for until the latter date it does not appear that the surety has paid more than his share (*s*).

Proportion for which each surety is liable.

The proportion which each surety is bound to pay as his own share differs at law and in equity. At law it is calculated in reference to the original number of sureties, though some of them have since become insolvent (*t*), or have died since the making of the contract (*u*). But in the latter case the Court of Queen's Bench were strongly of opinion that the personal representatives of the deceased surety would be liable

(*p*) *Fisher* v. *Fallowe*, 5 Esp. 171.
(*q*) *Reason* v. *Wirdnam*, 1 C. & P. 434.
[(*r*) *Jones* v. *Orchard*, 16 C. B. 614; 24 L. J. C. P. 229.]
(*s*) *Davies* v. *Humphreys*, 6 M. & W. 153, 169.
(*t*) *Cowell* v. *Edwards*, 2 B. & P. 268.
(*u*) *Batard* v. *Hawes*, 2 E. & B. 287.

for a share. In equity, however, it is calculated according to the number who are still solvent (*v*).

Interest.

[In equity, also, the surety has been held entitled as against his co-sureties to interest on what he has paid (*w*).]

Costs of suit.

Where the plaintiff and defendant had executed, as sureties, a warrant of attorney, given as a security for the debt of their principal, and on default by him, judgment was entered up on the warrant of attorney, and execution issued for the amount due, which the plaintiff paid with costs, it was held that he might recover the moiety of the costs of the execution (*x*). But he cannot recover costs improperly incurred in defending an action brought by the original creditor, and money paid by the principal debtor cannot be applied in payment of such costs, but must be taken in reduction of the debt itself (*y*).

When sureties are bound by different instruments.

The right to sue a co-surety for contribution exists equally whether they are bound in one instrument or several, and whether they knew of each other's engagements or not; for the payment by one is equally a benefit to the others (*z*). There is one important difference, however, viz., that sureties bound by the same instrument must all contribute equally, whereas, if bound by different instruments, the sums in each ascertain the proportions of the principal debt they are to pay (*a*). But one surety, who has induced another to enter into an engagement of suretyship, has no claim against him for contribution (*b*). And so, if by arrangement between themselves, one of the joint contractors, though liable to the creditor, was not to be ultimately liable to pay any portion of the debt, no action could be maintained against him (*c*).

Where there are several under-lessees, at distinct rents, of separate portions of premises held under one original lease, at an entire rent, and one pays the whole rent under a threat of distress, he cannot have an action for contribution against the

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(*v*) *Peter* v. *Rich*, 1 Cha. Rep. 19.

[(*w*) *Hitchman* v. *Stewart*, 3 Drew. 271; 24 L. J. Ch. 690.]

(*x*) *Kemp* v. *Finden*, 12 M. & W. 421.

(*y*) *Knight* v. *Hughes*, 3 C. & P. 467.

(*z*) *Deering* v. *Winchelsea*, 2 B. & P. 270; *Craythorne* v. *Swinburne*, 14 Ves. 160.

(*a*) 2 B. & P. 273.

(*b*) *Turner* v. *Davies*, 2 Esp. 478.

(*c*) *Per* Lord Campbell, *Batard* v. *Hawes*, 2 E. & B. 287; *Craythorne* v. *Swinburne*, 14 Ves. 160.

other lessees. His only remedy is in equity (*d*). But it is different where several have bound themselves for the rent of an entire set of premises. Therefore where the plaintiff and defendant, who were members of a committee, hired premises from D. for the use of their company, and the plaintiff was sued for the rent, he was allowed to recover contribution from the defendant, though the latter had ceased to be a member of the committee before the rent had accrued (*e*).

II. Life, Fire, and Maritime Insurance.

Life insurance.

The two former of these heads require little remark. A life insurance is a simple contract to pay such a sum at the death of the insured, and neither more nor less than this sum, with interest, under 3 & 4 W. IV. c. 42, s. 29, can be recovered. It was once decided in a remarkable case arising out of the debts of W. Pitt, that a life insurance, when entered into by a creditor of the party insured, was a contract of indemnity, and that he could only recover upon it the amount of debt still unpaid when the policy became due (*f*). This decision was for a series of years rather acquiesced in than confirmed, while in practice it was uniformly disregarded by the insurance offices, who always paid the amount of the policy without asking any questions as to the existence of the debt. The decision itself has been simultaneously overruled, at law and in equity, by two very recent cases (*g*). It is now settled that the stat. 14 Geo. III. c. 48, s. 3, (*h*) which enacts, "that no greater sum shall be recovered from the insurers (*i*) than the amount or value of the interest of the insured in such life," refers to the interest possessed at the time of making the policy.

(*d*) *Hunter* v. *Hunt*, 1 C. B. 300. [Nor is a landowner under any obligation to indemnify the owner of a stack of wheat which, being lawfully on the land, is seized by the Ecclesiastical Commissioners under 6 & 7 W. IV. c. 71, for a tithe-rent charge on the land; *Griffinhoofe* v. *Daubuz*, 4 E. & B. 230; 24 L. J. Q. B. 20; affirmed 5 E. & B. 746; 25 L. J. Q. B. 237, in Ex. Ch.]

(*e*) *Boulter* v. *Peplow*, 9 C. B. 493.

(*f*) *Godsall* v. *Boldero*, 9 East, 72.

(*g*) *Dalby* v. *India and London Life Assurance Co.*, 24 L. J. C. P. 2; 15 C. B. 365; *Law* v. *Indisputable Assurance Co.*, 1 Kay & John. 223; 24 L. J. Ch. 196.

[(*h*) Extended to Ireland by 29 & 30 Vict. c. 42. By 30 & 31 Vict. c. 144, assignees of policies who have given notice, may sue in their own names.]

[(*i*) That is, whether upon one policy or many; *Hebdon* v. *West*, 3 B. & S. 579; 32 L. J. Q. B. 85. In that case a promise by the person whose life was insured, to employ the plaintiff for seven years at a certain salary, was considered to be a pecuniary interest in the life to the extent of as much of the period of seven years as remained unexpired at the time when the policy was effected.]

Insurance against accidents.

Of course an insurance against injury to life or limb by accidents, is strictly a contract of indemnity. In case of death, the amount is regulated by the sum insured. Where the injury falls short of death, the damages are not to be estimated by any proportion between the amount of injury sustained by the accident, and the amount of loss by death. The true measure is the amount of injury the plaintiff has sustained, not exceeding the entire sum insured; that is the expense, and pain, and loss, it may be of a limb, connected with the immediate accident, but not the remote consequences that may follow, according to the pursuit or profession which he may be following. Therefore, loss of time or profits cannot be considered, otherwise one party, whose time was more valuable than that of another, would, for precisely the same personal injury, receive a larger remuneration (*k*).

Fire insurance a contract of indemnity.

A fire insurance differs from a life insurance in being properly a contract of indemnity; the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings and effects (*l*). Most fire policies contain provisions by which the company is at liberty either to pay the amount of the loss, or to supply the like quality or quantity of goods with those burnt or damaged by fire, and rebuild the premises themselves (*m*).

Mode of valuing subject matter.

There is a remarkable dearth of decisions in England on the subject of damages in the case of fire insurance; probably on account of the liberality usually displayed by the com-

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(*k*) *Theobald* v. *Railway Passengers' Assurance Co.*, 10 Exch. 45; 23 L. J. Ex. 249.

(*l*) *Per* Lord Campbell, *Dalby* v. *India and London Life Assurance Co.*, 15 C. B. 365; 24 L. J. C. P. 6.

(*m*) See Forms in Park on Insurance; Marshall, Insurance. [When they have once elected to re-instate they are bound to do so or to pay damages for not doing so, though performance may have become impossible; *Brown* v. *Royal Insurance Soc.*, 1 E. & E. 853; 28 L. J. Q. B. 275; decided upon demurrer, and *dissentiente*, Erle, J. In this case the Commissioners of Sewers had caused the structure insured to be taken down as being in a dangerous condition. The Court expressly declined to state upon what principle the damages were to be assessed. *Morrell* v. *Irving Fire Ins. Co.*, 33 N. Y., 429, is also an authority that an election to rebuild converts the contract of insurance into a building contract; and that the damages in case of partial performance will be the amount required to complete the building by making it substantially like the one destroyed; and that where two companies have elected to rebuild, the entire damages may be recovered from one company, leaving them to seek contribution from the other.]

panies (*n*). The question was, however, very fully discussed in an American case, in which some leading principles were laid down, with that fulness which characterises the judgments of the Transatlantic Courts. The plaintiff was lessee of a term, which would expire on the 1st September. Upon the land was a moveable building. He had the option of either renewing his lease, or taking away the building with him. It was insured for 160*l.* with the defendants. On the 15th August it was burnt, the lessee having at that time given no notice to renew the lease. The only question at the trial was as to its value. Evidence was given that the building if suffered to remain on the premises was worth 200*l.*, but that if taken away, it would only, as a separate chattel, be worth 40*l.* The defendants contended, that as at the time of the fire no notice to renew the lease had been given, it must be presumed that the plaintiff did not intend to renew it, and therefore the building should be valued at 40*l.*, which was all it would be worth to him when taken away. The plaintiff, on the other hand, claimed to recover the whole amount of the policy, on two grounds. First, that the sum named must be taken to be the ascertained value of the subject-matter of insurance. Secondly, that the intrinsic value of the building as it stood should be the standard of measurement, and not its value in reference to his mode of dealing with it. The Judge ruled in his favour on the latter ground, and this ruling was decided to be correct by the Supreme Court of New York (*o*). The first point made by the plaintiff was given against him, the Court holding on the analogy of marine insurance, and on the authority of two English cases (*p*), that "the recovery of the assured must be regulated by the value of the property; for if the policy be a personal agreement to indemnify him against loss or damage, his claim will be satisfied by the reimbursement to him of the actual value of the property at the time, which is the true amount of his loss by the peril;" and that the amount named did not operate as an agreed valuation

Amount of policy not an agreed valuation.

[(*n*) There have been numerous decisions in North America which, with those in Great Britain, will be found collected in Littleton and Blatchley's Digest of Fire Insurance Decisions, 2nd ed., New York, 1868.]

(*o*) *Laurent* v. *Chatham Fire Insurance Co.*, 1 Hall, 41.

(*p*) *Lynch* v. *Dalzell*, 4 Bro. P. C. 431; *Sadlers' Co.* v. *Badcock*, 2 Atk. 554.

of the subject-matter. "The undertaking is to pay the amount of the actual loss or damage, but with the restriction of the amount of the payment to the sum mentioned in the policy."

Absolute value of the property to be taken, not its value to the insured.

On the second point their judgment was equally clear in his favour. "But it is said that the policy is a contract of indemnity, and that the principle of indemnity which pervades the insurance, must control the construction of the policy; and upon this principle it is insisted, that the value of the property to the assured at the time of the loss, circumstanced as it may then be in reference to his use and enjoyment of it, is the loss he sustains by the destruction of it, and is the measure of his indemnity for the loss. It will be at once seen that if this principle of indemnity is to be admitted, the extent and value of the recovery will in every case vary with the special and peculiar circumstances of the insured, and the local advantages or disadvantages of the building, and the uses to which it is applied; and the intrinsic value of the building will form no criterion of the loss of the proprietor in case of its destruction. A building for example, which the necessities of the owner compel him to offer at public sale for ready money, will be worth to him no more than what it will produce at such a sale; and a building for which there happens to be a great competition, will command a much larger price than its true value. Are these collateral and incidental circumstances to enter into the estimate of value? Two houses of equal value may, from their local situation, be very unequal in the revenue they produce to their proprietors; would the loss of them, if destroyed by fire, entitle the proprietors to different indemnities, in proportion to the rents or the revenues of the tenants? It is the tenement upon which the insurance is made, and the actual value of it, as a building, is the loss of the insured in case of its destruction by fire. To that measure of indemnity the proprietor is entitled, however unproductive the property may be, and he is entitled to no more, whatever revenue he may have derived from the tenement." "It is of no importance whether the tenement stands on freehold or leasehold ground, or whether the lease is about expiring, or has the full time to run, when the fire occurs, or whether it is renewable or not. The condition of

the policy is satisfied if the title and ownership are in the insured, at the time of the insurance, and at the time of the loss. And the measure of his indemnity is the amount of his interest in the tenements when destroyed by fire, notwithstanding that the whole interest would have expired the very next day, or soon after the loss occurred. But whether there may not be incidents, or special circumstances so intimately connected with the premises, or so permanently attached to them, as to affect their intrinsic value, or the insurable interest of the party in them, we are not prepared to say, and it is not material to the decision of the question before us to inquire, for this clearly is not such a case."

Whether property destroyed should be taken at its value before destruction, or at the amount for which it might be replaced?

I am not aware that it has ever been decided, whether the thing insured should be estimated at its value when destroyed, or at the amount for which it might be replaced. In the case of goods, the two values would be in general synonymous. Half-worn furniture, for instance, might be replaced by second-hand articles of precisely similar value. Of course articles of *vertu*, such as antiques, statues, or pictures, which could not be replaced at all, or only at an extravagant cost, would clearly come under the former rule. The question would probably arise in the case of houses. Suppose a house, from age or dilapidation, to be only worth 700*l.* when burnt, but that it could not be rebuilt at all without an outlay of 1000*l.*, and that the policy was for the latter amount, would the larger or only the lesser sum be recoverable? I apprehend still the lesser. It might no doubt be argued, that the value of the house was not to be taken at the amount for which it would sell, but at the amount which the owner could make by keeping it; that this value could only be replaced by putting him again in possession of a house of similar capacity, and that the cost for which this could be done, ought to be the measure of his indemnity. The plain answer seems to be, that the policy is a contract to insure against all loss caused by fire, but not against any loss caused by time, weather, or any other source of dilapidation. The effect of the opposite rule to that for which I contend, would be in the event of fire, to throw upon the insurer the charge of making good all want of repairs by the owner, however culpable; and all depreciation by lapse of time, however necessary. The insured would step

out of an old house into a new one at the expense of the insurer (*q*).

It was assumed all through the American case which I have quoted, that the value should be taken at the time of the destruction, on whatever principles it was to be calculated. But this cannot have much weight, as the policy expressly provided that the loss was to be estimated, "according to the true and actual value of the property at the time the fire shall happen."

The analogy of marine insurance seems decisive upon this point. There the well-known rule of deducting one-third new for old, in valuing repairs (see post, Marine Insurance), is based upon this principle. The same has been lately decided in a kindred case, viz., that of a covenant to repair by a tenant. It was held that when the house was burnt down, the tenant was entitled to deduct from the full cost of rebuilding, the increased value which the new premises would have, as compared with the old. The residue only could be recovered in an action for breach of covenant (*r*).

Insurance by parties having only a partial interest.

Bailees, who have an interest in goods, such as wharfingers and warehousemen, may insure them to their whole value. Where the property is entirely destroyed, the whole of it must be made good; and not merely the particular interest of the assured in it. They will be entitled to keep for their own indemnity as much as will cover their interest in the goods; and they will be trustees of the residue of the money for the absolute owners (*s*).

[(*q*) The question arose in Ireland in an action on a policy of insurance on the machinery in a mill, and Pennefather, B., ruling that the plaintiff was not entitled to the full expense of replacing new machinery in the mill, said—"The loss is to be estimated by the expense the plaintiff would be at in restoring the premises to the state in which they were at the time of the fire. But inasmuch as there may be a difficulty or an impossibility in restoring the premises to the state in which they were, I think it would be a fair criterion to see what would be the expense of placing new machinery, such as was in the mill before, and to deduct from that expense the difference in value between such new machinery and the old machinery which was destroyed. I think such difference is the actual loss sustained by the plaintiff." *Vance* v. *Forster*, Irish Circuit Reports, 47 (1841). See also *per* Channell, B., at Nisi Prius, *Times Fire Ass. Co.* v. *Hawke*, 28 L. J. Ex. 317; 1 F. & F. 406.]

(*r*) *Yates* v. *Dunster*, 24 L. J. Ex. 226; 11 Exch. 15, S. C.

(*s*) *Waters* v. *Monarch Assurance Co.*, 5 E. & B. 870; 25 L. J. Q. B. 102; [*London and N. W. Ry. Co.* v. *Glyn*, 1 E. & E. 652; 28 L. J. Q. B. 188; and see *N. British, &c., Insurance Co.* v. *Moffatt*, L. R. 7 C. P. 25; 41 L. J. C. P. 1. See also as to the insurable interest of tenants from

Collateral loss.

No loss of a merely collateral nature can be recovered. Therefore the landlord of an inn who had insured "his interest in the said Ship Inn and offices," was not allowed to recover a claim for rent paid by him to his landlord, for the hire of other apartments while those damaged in the inn by fire were undergoing repair, or for the loss or damage sustained by him by reason of various persons refusing to go to the Ship Inn whilst the apartments so damaged were undergoing repair. The Court said, as to the last item, that if a party would recover such profits as these, he must insure them as profits (*t*).

Expenses of

It is not settled whether insurers in fire policies are liable for expenses incurred to save the destruction of the thing insured. Mr. Phillips is of opinion that equitably, and from analogy of general average under a marine policy, the underwriters against fire on land ought to be answerable for the expense of measures taken successfully to save the insured property, for which, had it been lost, they would have been liable to make indemnity (*u*).

Marine Insurance.

In discussing the doctrine of damages in Marine Insurance, we cannot complain of a paucity of decisions. They are as numerous under this head as they were scanty under the two former. One fertile source of debate has arisen out of the right of the insured, in some cases of partial loss, to abandon the subject-matter of insurance to the insurer, and then claim as if the loss had been complete at first. It will be necessary then to examine; first, when the loss is originally total; secondly, when it can be made so by abandonment; thirdly,

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year to year, *Simpson* v. *Scottish Union Insurance Co.*, 1 H. & M. 618; 32 L. J. Ch. 329; and compare *Niblo* v. *N. American Insurance Co.*, 1 Sandf., N. Y. 551. There have been decisions in America that a mortgagee who has insured buildings may recover though the mortgaged premises be still ample security for the debt; *Kernochan* v. *N. York Bowery Fire Insurance Co.*, 5 Duer. N. Y. 1; affirmed 17 N. Y., 428 (1858); or though the mortgagor have rebuilt; *Foster* v. *Equitable Mutual Fire Insurance Co.*, 68 Mass. 216 (1854). Whether the insurers after payment are equitably entitled to an assignment of the mortgage debt has been disputed; see *Kernochan* v. *N. York Bowery Fire Insurance Co.*, *supra*, and Angell on Insurance, s. 59. In England the mortgagor usually insures in the joint names of himself and the mortgagee.]

(*t*) *In re Wright & Pole*, 1 A. & E. 621; [so *Menzies* v. *North British Insurance Co.*, 9 Cases in Court of Sess., N. S. 694; *Niblo* v. *N. American Insurance Co.*, 1 Sandf., N. Y. 551.]

(*u*) 1 Phill. on Ins. 626, 3rd. ed.

when it is always partial; and fourthly, how the loss in either case is to be valued.

1. Where the loss is total without abandonment.

Loss, total, without abandonment.

This takes place where the subject-matter of insurance is utterly destroyed, or lost to the owners by detention, seizure, barratry, and so forth (*v*). And where there has once been a total loss, as where a vessel and cargo were barratrously taken out of their course by the crew, it makes no difference that part of the property subsequently comes into the hands of the owners, by an act which was not done, nor authorised by them. Such property, however, is salvage for the benefit of the underwriters (*w*). And it will be equally a total loss though the thing exist in specie; provided it has lost its character, and has ceased to be of any use to the owners as the thing which it originally was (*x*), though it possess some value in some inferior form (*y*). And though after the time of the disaster it still retains, and is saleable under, its original denomination; still if it is clear that the damage is so great that before the completion of the voyage "the species itself would disappear, and the goods assume a new form, losing all their original character," this is also a total loss. Because the risk does not end till the termination of the voyage, and that which must necessarily end in a total loss at the completion of the voyage, must be treated as a total loss at the time of the accident (*z*). Though it is a total loss if the goods are in the hands of strangers, not under the control of the assured (*a*), the seizure of the ship or goods by the lender on a bottomry bond; or by the Admiralty as a lien for salvage dues, is not such a seizure as can cause a total loss; as it arises out of the acts of the owner himself, and not out of any of the perils insured against (*b*). Whether the injury can be repaired or not, will depend on the circumstances of the place, as an accident may be remedied in one port while it

(*v*) *Mullett* v. *Shedden*, 13 East, 304; *Mellish* v. *Andrews*, 15 East, 13.
(*w*) *Dixon* v. *Reid*, 5 B. & A. 597.
(*x*) *Dyson* v. *Rowcroft*, 3 B. & P. 474.
(*y*) *Cambridge* v. *Anderton*, 2 B. & C. 691; *Irving* v. *Manning*, 1 H. L. C. 287.
(*z*) *Roux* v. *Salvador*, 3 Bingh. N. C. 266, 278.
(*a*) *Ibid.*, 279.
(*b*) *Rosetto* v. *Gurney*, 11 C. B. 176.

cannot possibly be in another. In the latter case also the loss would be total (*c*).

Constructive total loss,

2. Constructive total loss is where the thing exists in specie, and there is a physical possibility of repairing, or preserving it, so as that it may reach the termination of the voyage in its original character. But where this would have to be done at such an extravagant cost, taking all the circumstances of the case into consideration, that the subject-matter of insurance would not be worth the money laid out upon it, this is a constructive total loss (*d*). The circumstances to be taken into calculation in such a case, if it is the ship that is damaged, will be the possibility and cost of repair in the particular place where the injury has happened, and the means of procuring money (*e*). Where the loss has happened to goods, the question is, "Whether it was 'practicable,' (in the business sense of the word) (*f*), to send the whole or any part of the cargo to its destination in a marketable state?" To determine this question, the jury must ascertain the cost of unshipping the cargo; the cost of trans-shipping it into a new bottom, (where necessary); the costs of drying and warehousing it; and the costs of the difference of transit, if it can only be effected at a higher sum than the original rate of freight. Add to these items the salvage allowed in proportion to the value of the cargo saved,—and the loss will be total if the aggregate exceed the value of the cargo, when delivered at the port of discharge. But if the aggregate do not so exceed the value of the cargo, or of that part of it saved, the loss will be partial only (*g*).

in the case of the ship;

In the case of the cargo.

(*c*) *Moss* v. *Smith*, 9 C. B. 102.

(*d*) *Read* v. *Bonham*, 3 B. & B. 147; *Parry* v. *Aberdein*, 9 B. & C. 411; *Young* v. *Turing*, 2 M. & Gr. 593; *Moss* v. *Smith*, 9 C. B. 102. [In the case of an exceptional ship, for which there is no demand, the value to sell in the market may be much less than the true value; and it has been suggested that in such a case a more proper criterion will be the price given for the ship when new, with a deduction for wear and tear; *per* Wood, V.-C.; *African Steam Ship Co.* v. *Swanzy*, 2 K. & J. 664; 25 L. J. Ch. 870; *Grainger* v. *Martin*, 2 B. & S. 456; 31 L. J. Q. B. 186; 4 B. & S. 9, in Ex. Ch.]

(*e*) *Irving* v. *Manning*, 1 H. L. 287; 2 C. B. 784; 1 C. B. 168. [From the estimated cost of raising a submerged ship must be deducted the general average which would be contributed by the cargo; *Kemp* v. *Halliday*, L. R. 1 Q. B. 520; 6 B. & S. 757; 35 L. J. Q. B. 156, in Ex. Ch.]

(*f*) 9 C. B. 103.

(*g*) *Rosetto* v. *Gurney*, 11 C. B. 176 *Reimer* v. *Ringrose*, 6 Exch. 263; [*Farnworth* v. *Hyde*, L. R. 2 C. P. 204 36 L. J. C. P. 33, in Ex. Ch.]

Where the insurance is on the cargo, a mere retardation or interruption of the voyage, even if it amount to a loss of the whole season, is not a ground for abandonment. To justify this there must be an entire loss of the whole *adventure*, by the destruction, absolute or constructive, of the cargo itself, in consequence of the delay (*h*). And the utter destruction of the vessel makes no difference, if another can be found before the goods are destroyed by delay (*i*).

What loss of freight is total.

There is a loss of freight, either absolutely or constructively, where the ship is either absolutely or constructively unable to proceed on the voyage and earn it (*j*). But if, where the ship has been injured to such an extent as would have justified the owners in abandoning, the master has not done so, but has repaired, however imprudently, and in fact earned freight, they cannot afterwards abandon on finding that the repairs cost more than the ship and freight were worth (*k*). Nor is it any ground to claim as for a total loss of freight, that the expense of repairing the ship would exceed the whole amount of freight, if, taking the value of ship and freight both into consideration, it was prudent to repair. For the contract by the underwriter is, that the ship shall not be prevented from earning freight. Not that the freight shall be any profit when earned (*l*). And it makes no difference, that the cargo was so injured by accident, that the delay and expense of drying and re-shipping was greater than the freight was worth (*m*), which comes under the same principle.

Nor that the owner, on hearing of an embargo on the ship, abandoned to the underwriter on the ship, who consequently became entitled to the freight, which was actually earned on the removal of the embargo. Because this loss arose from the

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(*h*) *Anderson* v. *Wallis*, 2 M. & S. 240; [*Lozano* v. *Janson*, 2 E. & E. 160; 28 L. J. Q. B. 337.]

(*i*) *Hunt* v. *Royal Exchange Assurance Co.*, 5 M. & S. 47.

(*j*) *Green* v. *Royal Exchange Assurance Co.*, 6 Taunt. 68; *Idle* v. *Royal Exchange Assurance Co.*, 8 Taunt. 755; [or where the cargo is so damaged as to render it impossible, except at an expense which would greatly exceed its value on arrival, to carry it to the port of destination; *Michael* v. *Gillespy*, 2 C. B. N. S. 627; 26 L. J. C. P. 306.]

(*k*) *Chapman* v. *Benson*, 5 C. B. 330; affirmed in H. L. *Benson* v. *Chapman*, 8 C. B. 950; 2 H. L. Cas. 696.

(*l*) *Moss* v. *Smith*, 9 C. B. 102.

(*m*) *Mordy* v. *Jones*, 4 B. & C. 394; *Everth* v. *Smith*, 2 M. & S. 278. [See, however, *Michael* v. *Gillespy*, *supra*.]

voluntary act of the insured, with which and its consequences the underwriters on freight have no concern (*n*).

And so, in a very recent case, where a ship had sustained considerable injuries at sea, and further injury on arriving at the port of destination; the cargo was, however, delivered to the consignees, who paid the freight. The owners abandoned to the insurers on the ship, who were held to be entitled to the freight, upon which they sued the insurers on the freight; it was decided that they could not recover (*o*).

Notice of abandonment must be given;

Where a constructive loss is treated as total, immediate notice of abandonment must be given to the underwriters. Otherwise the owners can only recover as for an average (*p*); and if they once elect to treat it as a partial loss, they cannot afterwards make it total by abandonment (*q*). But the fact of a notice of abandonment having been given, which was ineffectual as coming too late, is no bar to their recovering for a total loss, if an absolutely total loss does ultimately arise from the cause upon which the constructive loss was originally based. As where a ship's papers were first taken away by a foreign government, and some months afterwards—as the result of the same act—she was finally seized (*r*).

except in the case of freight.

In the case of an insurance on freight, however, no abandonment is necessary, for the simple reason that there is nothing to be abandoned (*s*). There never can be a total loss of freight, except from the inability of the ship to earn it, and from its having in fact not earned it (*t*). The ship may either be utterly destroyed, or it may be sold to third parties, or it may be abandoned to the underwriters on the ship itself. In the first case, it can earn no further freight; in the second case, anything earned by it, after the abandonment, would, of course, belong to the owners; in the third case, to the underwriters (*u*).

(*n*) *M'Carthy* v. *Abel*, 5 East, 388.

(*o*) *Scottish Marine Assurance Co.* v. *Turner*, 4 H. L. Ca. 312, n.

(*p*) *Mitchell* v. *Edie*, 1 T. R. 608; *Martin* v. *Crokatt*, 14 East, 465; *Hunt* v. *Royal Exchange Assurance Co.*, 5 M. & S. 47; *Fleming* v. *Smith*, 1 H. L. C. 513; *Knight* v. *Faith*, 15 Q. B. 649.

(*q*) *Fleming* v. *Smith*.

(*r*) *Mellish* v. *Andrews*, 15 East, 13.

(*s*) *Green* v. *Royal Exchange Assurance Co.*, 6 Taunt. 68; *Mount* v. *Harrison*, 4 Bingh. 388; overruling *Parmeter* v. *Todhunter*, 1 Camp. 541; [and see *Potter* v. *Rankin*, L. R. 5 C. P. 341; 39 L. J. C. P. 147, in Ex. Ch.]

(*t*) *Moss* v. *Smith*, 9 C. B. 94.

(*u*) *Case* v. *Davidson*, 5 M. & S. 79; affirmed 2 B. & B. 379; *Stewart* v.

Insurance free of particular average.

The question, when a loss which is not actually total can be rendered so by abandonment, becomes of great importance in the case of insurances free of particular average. Of course, nothing can be recovered upon them unless a total loss can be made out. Therefore, where an insurance of this nature was made upon silk, and it became greatly damaged and stunk intolerably, so that it would have been necessary to unship, examine, clean, and dry it: the master sold it where it was. The jury found that he acted as a prudent uninsured owner would have done, but that the silk could at a reasonable and a moderate expense have been so treated as to be sent home as silk. It was held that this could not be made a total loss, and, therefore, nothing could be recovered (*v*). The principle, however, on which total and partial losses are distinguished is exactly the same, whether the policy admits of particular average or does not (*w*).

Total loss of separate parcels of the cargo.

[There has been, till lately, some authority for saying that] even where the insurance is free from average, if the goods insured are in separate parcels, as hogsheads of sugar, or bales of silk, there may be a total loss of some, though others are not injured within the terms of the policy (*x*). One case seems to go beyond this rule. The insurance was on flax, warranted free of particular average. The vessel was wrecked, and part of the flax was saved from the wreck, part floated on shore, but all the packages were broken up. No entire package came on shore. This was held to be a total loss as to that part which was never recovered at all (*y*). But where a cargo consisted of hogsheads containing loaves of sugar, and the vessel bilged, in consequence of which the greater part of the loaves in each hogshead were washed out, though some remained in each, this was held to be only a partial loss.

Greenock Insurance Co., 2 H. L. C. 159. [Where goods and ship belong to the same owners, and there is no pending freight, the underwriters on ship are entitled to compensation for the carriage of the goods in the ship subsequent to the casualty; *Miller* v. *Woodfall*, 8 E. & B. 493; 27 L. J. Q. B. 120. The underwriters are not entitled to freight earned by another ship into which the goods are transferred; *Hickie* v. *Rodocanachi*, 4 H. & N. 455; 28 L. J. Ex. 273.]

(*v*) *Navone* v. *Haddon*, 9 C. B. 30.

(*w*) *Roux* v. *Salvador*, 3 B. N. C. 277.

(*x*) *Lewis* v. *Rucker*, 2 Burr. 1170.

(*y*) *Davy* v. *Milford*, 15 East, 559.

The Court distinguished it from the preceding case, on the ground that there was a clear line to be taken; for some of the bundles of flax never came ashore (*z*). But the decision of *Davy* v. *Milford* did not turn upon that point at all, but upon the simple fact that some of the flax had never been recovered, and, therefore, had been completely lost. No distinction was taken between the flax in bundles, which were wholly lost, and that in bundles which were only partially lost. Indeed the distinction would have been impossible; for as the bundles were all broken up, there was no mode of ascertaining which were wholly, and which were only partially, destroyed. Perhaps, this is the real point of difference between *Davy* v. *Milford* and *Hedburg* v. *Pearson*. In both, there was a total loss of part of the property, which gave the insured a *primâ facie* claim for reimbursement; but in the latter instance the insurer was able to bring the loss within the exception of the policy, which in the former he could not. *Davy* v. *Milford* seems to have been [for a long time] rather a stumbling-block to the Bench. In a later instance (*a*), Lord Abinger is made to distinguish it on the ground, that "it was a policy of insurance upon sugar, where each hogshead was separately valued and insured; and therefore, a loss of one was properly held to be a total loss of that hogshead." All of which is mere fiction.

Ralli v. *Janson.*

[And at last the Court of Exchequer Chamber, in *Ralli* v. *Janson* (*b*), elaborately reviewed the case of *Davy* v. *Milford*, and the distinctions attempted to be taken between it and subsequent cases, and declared that the decision in *Davy* v. *Milford* did not in reality proceed upon the fact of the goods having been shipped in packages, but was intended to be and was a decision that the warranty "free of particular average" did not extend to a case of total loss of a part of the subject-matter insured, which had sunk to the bottom of the sea, and thereby ceased to exist: a proposition which as applicable to the case of shipment in bulk was at variance with later decisions, and

(*z*) *Hedburg* v. *Pearson*, 7 Taunt. 154.

(*a*) *Hills* v. *London Assurance Corporation*, 5 M. & W. 576.

[(*b*) *Ralli* v. *Janson*, 6 E. & B. 422; S. C. *nom. Janson* v. *Ralli*, 25 L. J. Q. B. 300. The law is the same in the United States, 2 Phillips on Insurance, s. 1773, p. 459, 3rd ed. See as to what constitutes a separate insurance on each package, *Entwisle* v. *Ellis*, 2 H. & N. 549; 27 L. J. Ex. 105.]

could not be maintained. After thus overruling *Davy* v. *Milford*, the law was laid down to be that "where memorandum goods of the same species are shipped, whether in bulk or in packages not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and though such package or packages be entirely destroyed, or otherwise lost by the specified perils."

In *Ralli* v. *Janson*, the Court expressly declined to say what the consequence would be, if the goods were not all of the same species. Two cases have since decided that where articles of different nature and kind are insured under a general description, the underwriters may be liable for a total loss of some of the articles, though the rest are preserved. In the first, the insurance was by the master of a vessel on "master's effects warranted free from all average." He saved his chronometer and a few other things, but the rest were totally lost. He was held entitled to recover the value of the articles lost. The word "effects" was considered to have been employed to save the task of enumerating the nautical instruments, chronometer, clothes, books, and other things of which they happened to consist (*c*). In the other case, the insurance was on "goods" valued at a certain sum, and the insured put on board an emigrant's equipment (*d*).]

Total loss changed into a partial.

3. The preceding remarks have necessarily involved a statement of the cases in which only a partial loss can be claimed. It is only important to add that a total loss may be changed into a partial one by matter subsequent; as where a total loss has occurred by capture, or in case of freight by embargo, which by recapture or removal of the embargo has been changed into a partial loss, in consequence of salvage and other charges; unless the ship, by reason of the capture and resulting loss and charge, is so valueless as, *per se*, to justify abandonment (*e*). And it makes no difference that

[(*c*) *Duff* v. *Mackenzie*, 3 C. B. N. S. 16; 26 L. J. C. P. 313.]
[(*d*) *Wilkinson* v. *Hyde*, 3. C. B. N. S. 30; 27 L. J. C. P. 116.]
(*e*) *Hamilton* v. *Mendes*, 2 Burr. 1198. [To change the total loss into a partial loss the ship or goods must not only exist, but the circumstances must

notice of abandonment was given, before the circumstances which turned it from a total into a partial loss were ascertained (*f*). Even though at that time nothing had occurred to alter the character of the loss (*g*); nor even that the abandonment has been accepted by the insurers (*h*).

Value may be agreed beforehand.

4. The character of the loss being settled, the next thing is to ascertain the value of the thing lost, which may be done either by evidence after the loss, or by the previous agreement of the parties. For a policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in determining the value of the subject insured by way of liquidated damages, as indeed they may in every other contract to indemnify (*i*). Therefore, when an insurance was made upon a ship, valued at 17,500*l.*, and she suffered damage to her rigging and machinery in a storm, which could not be repaired for less than 10,500*l.*, after which the ship would only have been worth 9000*l.*; no injury was done to her hull. The assured were allowed to abandon and recover the whole sum (*k*).

Amount recovered on other policies must be deducted.

[But the contract being one of indemnity, and both parties being bound by the agreed value, an assured who has recovered under other policies can only recover the difference between the amount so received and the agreed value in the policy (*l*).]

Where there has been a total loss on all the goods, if the policy is a valued one, the price fixed must be taken (*m*), [but a deduction must be made if part of the cargo has been landed (*n*).] Where the policy is open, the value of the goods

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be such that the assured may reasonably be expected to take possession; *Holdsworth* v. *Wise*, 7 B. & C. at p. 799; *Lozano* v. *Janson*, 2 E. & E. 160; 28 L. J. Q. B. 337.]

(*f*) *Bainbridge* v. *Neilson*, 10 East, 329.

(*g*) *Patterson* v. *Ritchie*, 4 M. & S. 393; *Brotherston* v. *Barber*, 5 M. & S. 418.

(*h*) *M'Carthy* v. *Abel*, 5 East, 388.

(*i*) *Per* Patteson, J., *Irving* v. *Manning*, 1 H. L. C. 287; 6 C. B. 391; affirming S. C., 1 C. B. 168; 2 C. B. 784.

(*k*) *Irving* v. *Manning*, *supra*; *Allen* v. *Sugrue*, 8 B. & C. 561.

[(*l*) *Bruce* v. *Jones*, 1 H. & C. 769; 32 L. J. Ex. 132.]

(*m*) *Lewis* v. *Rucker*, 2 Burr. 1171; *Irving* v. *Manning*, 1 C. B. 168; 2 C. B. 784; 6 C. B. 391.

[(*n*) *Tobin* v. *Harford*, 13 C. B. N. S. 791; 32 L. J. C. P. 134; affirmed in Ex. Ch. 17 C. B. N. S. 528; 34 L. J. C. P. 37. So in America; *Brook* v. *Louisiana Insurance Co.*, 4 Martin, N. S. 640, 681.]

is fixed by taking their invoice price at the port of lading, including premium of commission and insurance (*o*). And, perhaps, a payment made on the shipment of goods, as the price of the privilege of putting them on board, may be added to their value. But payments made for port charges, and other incidental expenses at the loading port, by virtue of a charter-party of which the insurers had no knowledge, cannot be so added (*p*).

Modes of valuing goods on open policy.

Where the insurance is on freight, and the policy is open, which rarely happens, the usage, sanctioned by decision, is to adjust the payment on the gross amount of freight payable, and not on the net amount after paying expenses (*q*).

Valuation of freight.

There may be a total loss of part of the freight, if the ship is so damaged that she either cannot absolutely, or cannot without extravagant cost, be repaired so as to bring home that part. But in estimating this, the cost must be calculated with reference to the entire value of ship and freight, not to the value of the freight only (*r*). In such a case, of course, an aliquot amount of the gross freight is the measure of damage.

In all cases of constructive total loss, whether of ship, goods, or freight, the insurer is entitled to the benefit of all that is made out of the subject-matter after the injury, as salvage (*s*).

Salvage.

The net salvage is that which remains after the expense of saving it, which must therefore be made good to the owner by the underwriters who benefit by it, in their respective proportions (*t*).

Where there is a policy of insurance on the freight of a specific cargo, if the captain, being driven back and unable to proceed with the original cargo, was yet able to proceed with a

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(*o*) *Usher* v. *Noble*, 12 East, 639.
(*p*) *Winter* v. *Haldimand*, 2 B. & Ad. 649.
(*q*) *Palmer* v. *Blackburn*, 1 Bingh. 61.
(*r*) *Moss* v. *Smith*, 9 C. B. 104, 108.
(*s*) *Roux* v. *Salvador*, 3 B. N. C. 281, 288; *Green* v. *Royal Exchange Assurance Co.*, 6 Taunt. 72. [Upon the same principle, underwriters who have paid the value stated in the policy upon a ship sunk through collision, as for a total loss, are entitled to the damages recovered from the owners of the other ship, which are in the nature of salvage; *North of England Insurance Association* v. *Armstrong*, L. R. 5 Q. B. 244.]
(*t*) *Sharp* v. *Gladstone*, 7 East, 24.

less cargo, on less freight, the underwriters are entitled to the benefit of this (*u*).

Valuation of partial loss to ship.

Where the loss is partial in the case of a ship, the question is, to what extent has she been injured by the accident? What was her difference in value before and after it? An obvious mode of ascertaining this is, by finding out what has been properly and prudently incurred in repairing the damage (*v*). If, however, the ship has been sold without repairs, under circumstances which do not entitle the owner to claim for a total loss, no allowance can be made for repairs which have not been effected, unless the ship sold for less in consequence of not being repaired. If she did, such difference of price would be the result of the peril insured, and of this difference the cost of repairs would be the measure. A ship met with a collision, returned to port, and was repaired. On setting out again it was discovered that she still leaked, and she returned again, and was again examined, and for that purpose stripped of her lower strake of wales. In consequence of the misconduct of the surveyors in not replacing her wales, her lower timbers decayed so rapidly by heat and rain, that it finally became useless to repair her, and she was sold to be broken up. This, of course, could not be claimed for as a total loss, the proximate cause of the injury not being a peril insured against. The plaintiff, however, claimed to recover what would have been the cost of replacing the wales (which had not been replaced) as a partial loss. Held, that if he could have shown that he was about to refit the vessel to put her into the state of a sailing ship, and that he meant to sell her as a sailing ship, that would have been one of the expenses which he might have insisted on. His measure of damage would then have been the expense of replacing the wales, or the difference in value between the ship so dismantled of her wales, and the ship with the wales put up again. But as she was sold avowedly to be broken up, and as for that purpose she would have fetched no more if the repairs had been executed, no allowance could be made on account of them (*x*).

New for old.

As, however, it would be unfair that the underwriters should

(*u*) *Green* v. *Royal Exchange Assurance Co.*, 6 Taunt. 68, 72.
(*v*) *Stewart* v. *Steele*, 5 Sco. N. R. 927.
(*x*) *Stewart* v. *Steele*, 5 Sco. N. R. 927.

pay the entire costs of repairs, while the owner is put in a better position than before by the substitution of new materials for old, a usage of subtracting one-third of the cost on this account has sprung up (*y*). The rule, however, extends no further than the reason for it, and therefore where the owner has derived no benefit, as where the vessel was on her first voyage (*z*), or where the ship has never come into the owner's hands, being either sold or broken up (*a*), no such reduction is made.

Valuation of partial loss to goods;

Where there has been a partial loss upon goods, if the policy is valued, the rule is as follows. As the price which the goods would have fetched, if sound, at the port of delivery, is to [the difference between that price and] the price which they do fetch being damaged, so is the value in the policy to the amount payable as loss. And it makes no difference that if they had not been damaged, they could have been kept and realised a much larger sum afterwards (*b*). Where the policy is not valued, the rule is still the same, substituting "the invoice price *plus* premium of insurance and commission," for "the value in the policy" (*c*). The object and effect of the rule in either case is the same, viz., to indemnify the assured without injustice to the insurer. The diminution in value is calculated by the relative price of sound and damaged goods at the port of delivery, where they would have to be sold; because it is their price there which alone can determine the ratio of loss. But the value in the policy, or the invoice price, is taken as the standard upon which payment is to be made; because otherwise the loss to the insurer would depend upon something against which he has not insured, viz., the rise or fall of the market.

partial loss of freight.

There can only be a partial loss of freight, as distinguished from a total loss of part of the freight, by reason of expenses incurred in preserving it (*d*); these, of course, create no difficulty in estimating. A shipowner on an insurance of freight,

(*y*) *Poingdestre* v. *Royal Exchange Assurance Co.*, R. & Mood. 378.

(*z*) *Fenwick* v. *Robinson*, 3 C. & P. 323; *Pirie* v. *Steele*, 8 C. & P. 200. [If the policy provides that the deduction shall not be made until the ship is of a certain age, but shall be made after that date, it becomes immaterial whether the first voyage has or has not been completed; *Byrne* v. *Mercantile Insurance Co.*, 4 H. & C. 506.]

(*a*) *Da Costa* v. *Newnham*, 2 T. R. 407; *Stewart* v. *Steele*, *ubi sup.*

(*b*) *Lewis* v. *Rucker*, 2 Burr. 1167.

(*c*) *Usher* v. *Noble*, 12 East, 646; *Waldron* v. *Coombe*, 3 Taunt. 162.

(*d*) *Moss* v. *Smith*, 9 C. B. 103.

may recover for the profits which he would have made by carrying his own goods; for these profits are of the same nature, whether he carries his own goods or those of another (*e*).

The extent of damages to which the underwriters are liable may sometimes be very difficult to ascertain; as, for instance, where a certain injury has happened from a cause insured against, and afterwards a fresh injury, which is not insured against occurs, and no examination has taken place in the meantime; the case, however, must still be left to the jury, and the apparent impossibility of arriving at a conclusion is no ground for directing nominal damages (*f*).

Charges incurred for the preservation of the vessel.

It seems by no means settled whether payments and charges incurred for the preservation of the vessel, cargo, and freight, are recoverable as average loss, or under the clause for "suing, labouring, and travailing" (*g*). Such expenses can be recovered, though incurred before a total loss arising from a cause for which the insurers are not liable (*h*); and though they make the total amount greater than the subscription of the underwriter (*i*). We have seen that two-thirds only of those incurred in repairing the vessel can under certain circumstances be set up (*k*). The charge for provisions and wages, where a ship is detained by an embargo, fall upon the owner, and are borne by the freight (*l*); these, therefore, are not recoverable from the insurer of the ship (*m*) unless it has been abandoned to him, and then as he stands in the place of the owner, he must bear them (*n*).

Liability of insurers to reimburse a general average loss.

A claim against the insurers may also arise out of any contribution, which the insured has been forced to make, in respect of an average loss. They are not bound, however, to reimburse to him the full amount of his contribution, but only that proportion of it which the value of his interest as insured

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(*e*) *Flint* v. *Flemyng*, 1 B. & Ad. 45.

(*f*) *Hare* v. *Travis*, 7 B. & C. 14; *Knight* v. *Faith*, 15 Q. B. 670.

(*g*) *Livie* v. *Janson*, 12 East, 648; *Le Cheminant* v. *Pearson*, 4 Taunt. 380; *Stewart* v. *Steele*, 5 Sco. N. R. 927, in which the latter opinion seems rather to prevail; *Da Costa* v. *Newnham*, 2 T. R. 407, in favour of the former.

(*h*) *Livie* v. *Janson*, 12 East, 648.

(*i*) *Le Cheminant* v. *Pearson*, 4 Taunt. 367.

(*k*) *Ante*, p. 266.

(*l*) *Da Costa* v. *Newnham*, 2 T. R. 414.

(*m*) *Robertson* v. *Ewer*, 1 T. R. 127.

(*n*) *Thompson* v. *Rowcroft*, 4 East, 34.

bears to its value as estimated for the purposes of contribution: or to put the same thing in another way, the owner of the goods (as one of the parties to the contribution) has to pay in contribution (suppose) 10 per cent. on their contributory value; but the underwriter has only to pay to the owner of the goods (as his assured) 10 per cent. on their value in the policy. Therefore, if the contributory value of the goods be 1500*l.*, and they are only insured for 500*l.*, the owner will have to pay 150*l.* contribution, but he can only recover 50*l.* of this from the insurer (*o*).

How far bound by foreign adjustment.

Where the adjustment of the average loss has been settled in a foreign port, on principles different from those which would have been acted upon in England, the underwriter is bound by such adjustment, when rightly settled according to the laws and usages of the place where it is made, and could have been enforced (*p*). But in the absence of clear proof that the usage of the country is such, the underwriter is not bound, unless the loss would be an average one in the country where the policy is made; and the mere recital of the law on the face of the foreign decree, assuming the supposed usage as its foundation, is not proof enough (*q*).

Interest.

As to interest under stat. 3 & 4 W. IV. c. 42, see *ante*, Tit. Interest (*r*). Independently of this statute, interest cannot be recovered as a matter of right (*s*).

General average.

III. It now remains to give a brief sketch of the doctrine of General Average, so far as it is connected with the question of damages.

A general average loss is defined to be a loss arising out of extraordinary sacrifices voluntarily made, or extraordinary expenses necessarily incurred, for the joint benefit of ship and cargo. Where such a loss has taken place in a sea adventure, all the parties engaged in it are bound to make good the loss incurred by one or more of their co-adventurers, by reason of such sacrifice or expense (*t*).

(*o*) 2 Arnould Ins. 950. [817, 4th ed.]

(*p*) *Walpole* v. *Ewer*, Park Ins. 898, 8th ed.; *Newman* v. *Cazalet*, *ibid.*, 900, 8th ed.; see the American cases, 2 Phill. 165.

(*q*) *Power* v. *Whitmore*, 4 M. & S. 141; 2 Arn. 946. [814, 4th ed.]

(*r*) *Ante*, pp. 111, 112.

(*s*) *Kingston* v. *M'Intosh*, 1 Camp. 518.

(*t*) Arn. 877. [794, 4th ed.] [As to what operations are for joint benefit of ship and cargo, see *Job* v. *Langton*, 6 E. & B. 779; 26 L. J. Q. B. 97; *Moran* v.

It does not come within the scope of this work to examine the cases in which this claim arises, nor to enquire when the loss may be subject of contribution, and when it must be borne by the shipowner. These questions fall strictly within the law of shipping and insurance, and will be found amply discussed in every treatise upon the point. Supposing, however, a claim for general average contribution to be established, it will then be necessary, with a view to damages, to ascertain, First, what is the fund from which contribution is to be made; Second, what are the principles upon which that contribution is to be calculated. These two heads will establish the amount of contribution to which the party suffering is entitled.

Sources of contribution.

I. The ship and freight always contribute (*u*). And all goods carried for traffic, whether they pay freight or not, and whether they belong to merchants, passengers, owners, or masters (*x*). And such goods pay according to value not weight; for the contribution is made not on account of the incumbrance to the ship, but of the safety obtained. Therefore, in this country bullion and jewels contribute according to their full value (*y*). But gold or silver, jewels, precious stones, or other articles of value, do not contribute when carried about the person, or forming part of the wearing apparel, nor does the luggage of passengers (*z*). Deck goods contribute, though they are in general not contributed for (*a*). Provisions and warlike stores do not contribute (*b*), although if cast overboard their amount is refunded. The reason of this is stated to be, that these articles themselves are the means of preserving and benefiting the whole. But this reason might with equal propriety be applied to all the ship's furniture. The true reason appears to be, that provisions, being destined to be consumed during the voyage, belong to wear and tear. The exception, however, only extends to what

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Jones, 7 E. & B. 523; 26 L. J. Q. B. 187; *Kemp* v. *Halliday*, 6 B. & S. 723; L. R. 1 Q. B. 520; 35 L. J. Q. B. 156; *Walthew* v. *Mavrojani*, L. R. 5 Ex. 116; 39 L. J. Ex. 81, in Ex. Ch.]

(*u*) Abbott Ship., 8th ed. 503. [549, 11th ed.]

(*x*) Abbott Ship. 502. [549, 11th ed.] *Brown* v. *Stapyleton*, 4 Bingh. 119.

(*y*) Abb. *ubi sup.*; 1 Magens, 62, 63.

(*z*) Arn. 919. [792, 4th ed.] Abb. 503. [549, 11th ed.]

(*a*) Stevens, 210; (Am. ed. Phill.;) Arn. 919, [792, 4th ed.]

(*b*) *Brown* v. *Stapyleton*, 4 Bingh. 119.

is meant to be used during the passage, and not to such provisions as may be shipped on freight (*c*). Goods carried by mariners on their own account contribute, unless perhaps when the permission of carrying a certain quantity is granted to them in lieu of wages (*d*).

Mariners do not contribute for their wages, except in the single instance of the ransom of the ship. In that case they are required to contribute, in order to encourage resistance (*e*). Ransom is now prohibited by statute (*f*), but only in the case of enemies. It is still lawful when the vessel has fallen into the hands of pirates or other plunderers (*g*).

Things sacrificed contribute.

That which has been sacrificed contributes, in general average, equally with that which has been saved. Otherwise the owner, receiving their total value, would suffer no loss by the sacrifice, while the other owners would. Not only goods jettisoned, but those which have been sold for the benefit of ship and cargo, contribute, for they are equally contributed for; and the same is the rule as to the freight, which would have been payable in respect of them; for it is also contributed for, and must therefore take its share in the entire loss (*h*).

Only property exposed to risk contributes.

Nothing of course contributes which has not been exposed to the risk; because if it was never placed in jeopardy, it was not saved by the loss, and cannot be liable to make it good. Therefore, neither goods landed, nor sold for the necessities of the ship before jettison, nor those taken on board afterwards, contribute (*i*). Nor do goods which have been jettisoned themselves contribute for any subsequent disaster, nor does the owner of goods jettisoned, who recovers them after a second jettison, contribute towards such subsequent loss (*k*).

Freight when contributory.

Freight, in order to be contributory at all, must have been pending at the time of the sacrifice. If the cargo, or part of it, has been delivered before the average loss, the freight due

(*c*) Benecké, 307.
(*d*) Benecké, 308.
(*e*) Abb. 504; [550, 11th ed.]; Benecké, 308.
(*f*) 22 G. III. c. 25; 43 G. III. c. 160, ss. 34, 35; 45 G. III. c. 72, ss. 16, 17.
(*g*) Arn. 916; [790, 4th ed.]
(*h*) Arn. 918; [792, 4th ed.]; Stevens, Av. 61, 6th ed.; Abb. 505; [552, 11th ed.]
(*i*) Arn. 917; [791, 4th ed.]
(*k*) Arn. 918; Benecké, 182; [But see Arn. 791, 4th ed., where the modern practice is stated to be different.]

in respect of it does not contribute, nor does freight paid in advance (*l*). Where a ship was chartered for an entire voyage out and home, under a stipulation that no freight was to be paid for the home voyage, unless both were performed safely, and a general average loss occurred on the out voyage; it was held that the freight home should contribute, on the ground that it was one entire sum (*m*). But this decision has been doubted by Benecké (*n*), who thinks that the freight ought to have been apportioned with a view to contribution, and that each voyage should bear its own loss (*o*).

Valuation of loss;

II. The principles upon which the contribution is to be made must depend upon two points: First, the mode of estimating the loss incurred; secondly, that of estimating the value of the property saved.

of goods.

1. As to goods; this will depend upon the place where the adjustment is effected. If at the port of starting, the value will be the price of the goods, increased by the shipping charges and insurance, if the goods cannot be replaced (*p*). If they can be replaced, their cost price and charges without insurance, which will be saved (*q*). Where the adjustment takes place at an intermediate port, or at the port of destination, they are taken at the net value they would have sold for there, deducting freight, duty, and landing expenses (*r*). If, however, the rest of the goods saved have been damaged by the same accident as that which caused the jettison, or by a subsequent disaster, it may be presumed, that if the goods cast away had remained on board, they would have met a similar fate. Their value must be estimated, as if they had arrived at the port of adjustment in a state of as great damage

Deduction for probable injury;

(*l*) Arn. 937; [808, 4th ed.]; Benecké, 314. [But if it is not to be recovered back by the shipper in any case, it contributes in the hand of the shipper either directly as an interest in freight, or indirectly in the enhanced value of his goods at risk; *Frayes* v. *Worms*, 19 C. B. N. S. 159; 34 L. J. C. P. 274; Arn. 808, 4th ed.]

(*m*) *Williams* v. *London Assurance Co.*, 1 M. & S. 318.

(*n*) P. 315.

(*o*) See 2 Phill. 142, as to cases where a ship is chartered for successive ports.

(*p*) Benecké, 289; Arn. 929; [801, 4th ed.]; *Tudor* v. *Macomber*, 4 Pick. 34; 2 Phill. 131. [Pre-paid freight must be also added if the goods would have been carried on; *Fletcher* v. *Alexander*, L. R. 3 C. P. at pp. 385, 387; 37 L. J. C. P. 200, 202; *Frayes* v. *Worms*, *supra*.]

(*q*) Benecké, 288.

(*r*) Arn. 929; [801, 810, 4th ed.]; Benecké, 288, 289.

as the rest of the cargo (*s*). And if liable to leakage, or breakage, a similar deduction ought to be made on that account (*t*). If the goods jettisoned are recovered before adjustment, the loss is estimated by adding the amount of damage they have sustained to the expenses of recovering them (*u*).

Jewels, &c.

Where jewels or other articles of great value are designated in the bills of lading as of inferior value, they are allowed for at the value stated. But articles of this nature in passengers' trunks are allowed for at their real value, because no bills of lading are signed for such goods (*x*).

Deck goods.

As a general rule, goods taken on deck are not contributed for if lost (*y*). But where an established usage to carry goods in this manner is proved, they may be contributed for; as for instance timber, or pigs carried between Waterford and London (*z*).

Freight.

The amount payable for freight of goods jettisoned is calculated at the gross amount they would have earned if saved (*a*). But if part of the goods saved by the jettison are afterwards

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(*s*) Benecké, 290; Arn. 930; [801, 4th ed. This question was considered in a recent case, in which half of a cargo of salt on board of a ship which sailed from Liverpool to Calcutta, was jettisoned on the Irish coast, and the other half brought back to Liverpool so damaged as to be almost worthless. The conclusion to be drawn from the discussion would seem to be that there is no rule or presumption of law respecting the condition in which the goods jettisoned would have arrived if they had not been thrown overboard; but regard must be had to all the probabilities of the case, the nature of the goods, and the mode in which they were packed. And that if, under the circumstances of that case, the average stater came to the proper conclusion that they would have arrived at Liverpool in a sound state, so that they might have been carried on, the value would be the cost price, with the shipping charges, premium, and prepaid freight. If, on the contrary, he came to the conclusion that they would have arrived so damaged as not to be worth carrying on, or the ship was so damaged that she could not be repaired so as to carry on the adventure, the value of the goods in their damaged condition must be taken without freight or charges; *Fletcher* v. *Alexander*, L. R. 3 C. P. 375; 37 L. J. C. P. 193.]

(*t*) 2 Phill. 131.

(*u*) Arn. 930; [802, 4th ed.]; 2 Phill. 134.

(*x*) Benecké, 294.

(*y*) *Ross* v. *Thwaite; Backhouse* v. *Ripley*, Park Ins 23, 24; [*Miller* v. *Tetherington*, 6 H. & N. 278; 30 L. J. Ex. 217; affirmed 7 H. & N. 954; 31 L. J. Ex. 363.]

(*z*) *Gould* v. *Oliver*, 4 B. N. C. 134; *Milward* v. *Hibbert*, 3 Q. B. 120. [In the United States, this exception in favour of established usage is not allowed; Arn. 767, 4th ed., citing *Cram* v. *Aiken*, 13 Maine (1 Shepley), 229; *Lenox* v. *United Insurance Co.*, 3 Johns. (N. Y.), 178, 179; *Smith* v. *Wright*, 1 Caines, 43; *Dodge* v. *Bartol*, 5 Greenleaf, 286.]

(*a*) Arn. 931; [802, 4th ed.]

lost, it must be presumed that a similar portion of those cast away would have been lost also, and freight can only be allowed on the residue (*b*).

Ship.

Damages done to the ship in such a manner as to form a general average loss, may amount to a partial injury, or a total destruction. In the former case, the measure of indemnity is the cost of repair, deducting one-third new for old (*c*). In the latter case, it was, however, contended that no contribution at all should take place. It was argued that where the destruction of the vessel, by running her aground, suppose, became absolutely necessary, it was no longer such a voluntary act as would constitute an average loss. That if it was not absolutely necessary, it was merely a gratuitous damage. The contrary doctrine, however, has been established in America, on the ground that such an act, though morally speaking necessary, involves a sufficient exercise of choice and volition to render it voluntary; and that the owner ought not to be deprived of all recompense, because a greater loss has happened than was perhaps anticipated (*d*). The measure of adjustment in this case is the value the ship would have been to the owner, if he could have had her in security at the moment of the loss, and the gross freight which she would have earned (*e*).

When totally lost.

Where goods have been sold.

When goods are sold to raise money for the repairs of the ship, the loss in general falls wholly on the shipowner, and is not the subject of contribution; for the owner of the ship undertakes to have the ship fit to perform her voyage, and any expenses incurred for this purpose must be borne by him (*f*). The contrary, however, will be the case where they have been sold to effect repairs, which arise out of what was itself a general average loss. In such a case they must be contributed for according to the price they would have fetched at their port of destination, subtracting freight, duty, and

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(*b*) Benecké, 291.

(*c*) Benecké, 294; Abb. 504 [551, 11th ed.].

(*d*) *Columbian Insurance Co.* v. *Ashby*, 13 Peters, 331; 3 Kent, Comm. 239.

(*e*) *Ibid.*; Arn. 831 [803, 4th ed.].

(*f*) *Powell* v. *Gudgeon*, 5 M. & S. 431, 437; *Duncan* v. *Benson*, 1 Exch. 537; affirmed 3 Exch. 644; *Hallett* v. *Wigram*, 9 C. B. 580; *Atkinson* v. *Stephens*, 7 Exch. 567.

landing expenses (*g*). The same questions as to the differemt mode of valuation arise in this case, as in that of goods sold by the master, for which the shipowner alone is answerable (*h*); and the same solution seems to be applicable. Mr. Arnould has no doubt that goods sold in this manner ought to be paid for, whether the ship arrives in safety or not; and distinguishes the case from that of jettison, on the ground that a debt is contracted by the sale, which is unaffected by the result of the adventure to which the money was applied (*i*).

Where money is raised for the general safety, and not merely to enable the shipowner to carry out his own contract, it must also be replaced by general contribution; with all attendant expenses, such as charges incurred in drawing, interest whether ordinary or marine, and loss in the exchange (*k*).

Mode of valuing the property saved.

2. The broad principle upon which the property saved is estimated is, that the value of the property to its owners, as saved by the sacrifice or the expenditure, is the value upon which it ought to contribute towards making good the loss (*l*). As the adjustment is generally made at the port of discharge, this is, in most cases, their net value in the state in which they come into their owners' hands at the port of destination (*m*).

In the case of the ship.

When the ship is sold, the price of course determines her value (*n*). If not, her value is ascertained by taking her value at starting, and subtracting from it, 1st. The provisions and stores expended; 2nd. Any partial loss she has sustained up to the time of adjustment (*o*); 3rd. Natural wear and tear of the voyage, unless made good by the repair of a particular

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(*g*) Arn. 931 [803, 4th ed.]; 2 Phill. 129; Benecké, 274.

(*h*) *Ante*, p. 222; 2 Phill. 129.

(*i*) Arn. 924 [798, 4th ed.]; *Powell* v. *Gudgeon*, 5 M. & S. 431. ["The result, therefore, of the authorities appears to be—1. That where goods are sold to defray the necessary repairs of the ship, they are paid for though the whole adventure may be finally lost. 2. That where they are sold for general average purposes, they are not to be contributed for unless something is saved;" Arn. 942, 2nd ed., see p. 798, 4th ed.]

(*k*) Arn. 932 [804, 4th ed.]; Benecké, 250.

(*l*) Arn. 932 [804, 4th ed.].

(*m*) Arn. 933 [805, 4th ed.].

(*n*) Arn. 934, n. (k) [813, n. (4), 3rd ed.]; *Bell* v. *Smith*, 2 Johns. 98. [As to ships of exceptional character, see *ante*, p. 258, n. (d).]

(*o*) Arn. 935 [806, 4th ed.].

damage (*p*); 4th. Perhaps any subsequent general average losses to which she has had to contribute (*q*). To this result, however, must be added again the amount paid to the ship as contribution on account of general average loss to herself (*r*). The sum so found will be the value at which she is to contribute.

Goods. Goods contribute on their actual net value, that is, on their market price at the port of adjustment, free of all charges for freight, duty, and landing expenses (*s*). When part of the goods are sold for money with a discount, and part on credit, by which a higher price is obtained; the usual discount and guarantee must also be deducted from the latter portion of their price. No deduction, however, is to be made for insurance premium, because it forms part of the prime cost, and its payment does not depend upon the future fate of the goods; nor for commission, because all parties are to be treated alike, whether the goods go into the hands of their proprietors, or of a commission agent (*t*).

Freight. The shipowner saves by the measure taken for the general benefit, so much of the freight as he finally receives from it; deducting that part of the wages which remained unpaid at the time of the accident, and deducting also those port and other charges which he would not have paid if the vessel had been lost. This is consequently the amount for which the freight ought to contribute. Wages paid in advance ought not to be deducted; for these advances cannot be considered as diminishing the freight saved, with which they stand in no connection whatever (*u*). No contribution is due from freight, when, owing to the length of the voyage or other causes, it is entirely consumed by the wages, for its contributory value is only its excess over wages. On the same principle, when a ship is disabled, and a cargo sent home in a second, the excess of freight for the entire voyage over that paid to the substituted ship, alone forms the contributory value of freight (*x*).

(*p*) Benecké, 312.
(*q*) Arn. 936, n. (o) [807, n. (3), 4th ed.].
(*r*) Arn. 936 [807, 4th ed.]; Benecké, 311.
(*s*) Arn. 940 [810, 4th ed.].
(*t*) Benecké, 301.
(*u*) Benecké, 313.
(*x*) Arn. 939 [809, 4th ed.]; *Searle* v. *Scovell*, 4 Johns. Ch. 218.

The application of these principles will be best shown by an example of an adjustment, borrowed from Arnould on Insurance: Example of adjustment.

VALUATION OF LOSSES.			VALUE OF ARTICLES TO CONTRIBUTE.	
Goods of A. jettisoned		£500	Goods of A. jettisoned	£ 500
Damage to goods of B. by the jettison		200	Net value of goods of B. deducting freight and charges	1000
Freight of A.'s goods jettisoned		100	Ditto of goods of C.	500
Price of new cable, anchor, and mast	£300		,, ,, D.	2000
Deduct ⅓ new for old	100		,, ,, E.	5000
		200	Value of ship, deducting wear and tear, amount of particular average loss, stores and provisions	2000
Expense of bringing ship off the sands		50	Clear freight, deducting wages	800
Pilotage, and expenses of going into and out of port to refit		100		
Expenses there		25		
Adjusting average		4		
Postage		1		
Total amount of losses to be contributed for		£1180	Total contributory value	£11,800

Hence each person contributes 10 per cent. of the value of his property, and receives the amount of loss he has suffered.

The shipowners contribute	£280	
Are to be paid	480	
Actually receive		£200
A. contributes	50	
Is to be paid	500	
Actually receives		450
B. contributes	100	
Is to be paid	200	
Actually receives		100
		£750
C., D., E. receive nothing and contribute severally	50 200 500	£750

This amount equals the amount to be actually received, and must be paid to the persons entitled in rateable proportions.

The foregoing observations upon Marine Insurance and Average present only a very meagre sketch of the law of damages arising out of those branches. The whole subject, however, has been so exhaustively treated in various well-known books, that I thought it unnecessary to go to any greater length. The reader can easily fill up the outline from the sources indicated.

CHAPTER XII.

1. *Ejectment.*
2. *Writ of dower unde nihil habet.*
3. *Writ of Quare impedit.*
4. *Action of Account.*

THE three first of these actions are the only mixed actions that now remain. Indeed ejectment is only such in a single instance. I have thrown in the action of account along with them, on the score of its venerable antiquity and obsoleteness, and because I have so very little to say upon the subject.

Changes in the character of ejectment.

1. The action of ejectment has undergone curious revolutions since its birth. Originally, the lessee of land had no remedy when ejected, except on the covenant made with him by his landlord. In no case could he regain possession of the land. Then the writ of *quare ejecit* was invented, by means of which he could recover the term, if ousted by his landlord, or any one claiming under him. It did not extend to strangers, however. Later still, the writ of *ejectione firmæ* was devised, which enabled him to sue any ejector for damages, but he could not be replaced in possession of the soil by means of it. Finally, it became settled, apparently about the time of Henry VII. (*a*), that restitution of the land could be enforced in this manner. The action of ejectment, while retaining its form as a personal action, became, thenceforward, substantially, a real action. The recovery of the soil alone was sought for, and only nominal damages were given (*b*). By the recent Common Law Procedure Act, 1852, it has lost even the disguise of an action of trespass, and has become avowedly a mere issue to try the right to the soil. The judgment is to recover possession of the land, without any mention of damages (*c*).

(*a*) Fitz. N. B. 505; [198, 220, 9th ed.]
(*b*) See Adams, Eject. 1—7. (*c*) Sched. A. 13—17.

This constitutes it strictly a real action. In one case, however, it becomes a mixed action, from the possibility of recovering damages. This occurs in ejectment by landlord against tenant, when it is enacted, that whenever it shall appear at the trial that the tenant or his attorney were served with due notice of trial, the claimant may be permitted, after his right is established, to give evidence of the mesne profits from the expiration of the tenant's interest down to the time of verdict, or some time preceding to be specially mentioned (*d*). And they may be recovered, though no notice is taken of them in the writ or issue. In fact it is to be considered that a claim for mesne profits is included in all actions under this section (*e*). As to damages in respect of mesne profits, see *post*, Ch. 14.

Mesne profits recoverable.

2. Both the writ of right of dower and of dower *unde nihil habet* are preserved by 3 & 4 W. IV. c. 27, s. 36. [The Common Law Procedure Act, 1860, s. 26, substitutes for them actions commenced by writs of summons, issuing out of the Court of Common Pleas in the same manner and form as in ordinary actions, but indorsed with notice of the Plaintiff's intention to declare in dower. By s. 25, the proceedings are assimilated to those in ordinary actions (*f*).] In [a case in which before this act] the former writ [would have been resorted to] no damages can be recovered (*g*). In [a case in which] the latter, they are given by the statute of Merton, 20 Hen. III. c. 1, by which it is enacted, "That if widows, after the death of their husbands, are deforced of their dowers, and cannot have their dowers without plea, they that be convicted of such deforcement shall yield damages to the same widows, that is to say, the value of the whole dower to them belonging, from the time of the death of their husbands unto the day that the said widows by judgment of our Court have recovered seisin of their dowers."

Writ of dower.

This statute does not apply where the wife has dower assigned to her in Chancery, for the words of the statute are,

(*d*) 15 & 16 Vict. c. 76, s. 214.
(*e*) *Smith* v. *Tett*, 9 Exch. 307.
[(*f*) For a case of dower since this Act, see *Woodward* v. *Dowse*, 10 C. B. N. S. 722; 31 L. J. C. P. 70. See also for so much of the old law as is applicable to its altered state, *William* v. *Gwyn*, 2 Wms. Notes to Saund. 72.]
(*g*) 1 Inst. 32 b.

Demand necessary.

"et viduæ *per placitum* recuperaverint" (*h*). And, for the same reason, the widow must make a demand of her dower, for otherwise the heir may plead that he has been always ready, and yet is, to render dower, and the demandant will lose the mean value and damages (*i*). But where the heir pleads *tout temps prist* with success, the demandant shall recover damages from the teste of the original to the execution of the writ of inquiry (*j*). But a demand is only necessary where this plea can be set up; and where it is not pleaded, damages are recovered from the death of the husband, and not from the time of suing out the writ (*k*).

Amount of damages.

The wife shall only recover damages when her husband died seised, that is seised of the freehold and inheritance (*l*). And this must be expressly so alleged (*m*). But where the husband has made a lease for years reserving rent, the wife shall recover the third part of the reversion with the third part of the rent and damages (*n*). And damages in such a case are according to the value, not of the land, but of the rent (*o*). Hence, if the rent was only a nominal one, only nominal damages can be obtained. Accordingly, where a testator devised that his executors should pay debts and legacies out of the rents and profits of his real estate, and when the debts and legacies were paid, devised it to his son, who died before the debts were paid, and before he had possession; the son's widow recovered her dower and damages. It was held that she could not count the value of the estate from her husband's death, but from the time the debts were paid, and the trusts performed (*p*). And in another case, where the jury had assessed damages to the amount of the entire value of the land from the death of the husband, the inquisition was set aside, the Court being of opinion that a deduction ought to be made for land-tax, repairs, and chief rents (*q*).

(*h*) 1 Inst. 33 a.
(*i*) 1 Inst. 32 b.
(*j*) Park. Dower, 303.
(*k*) *Dobson* v. *Dobson*, Ca. temp. Hardw. 19; *Kent* v. *Kent*, 2 Barn. B. R. 357.
(*l*) 1 Inst. 32 b.
(*m*) *Jones* v. *Jones*, 2 C. & J. 601.
(*n*) 1 Inst. 32 b.
(*o*) Hargr. Co. Litt. 32 b. n. 5.
(*p*) *Hitchens* v. *Hitchens*, 2 Vern. 404.
(*q*) *Penrice* v. *Penrice*, Barnes, C. P. 234.

In the same case, the Court decided that damages ought not to be given to the day of the inquisition, but only to the day of awarding the writ of inquiry (*r*). This opinion, however, has since been overruled, and it is now settled that damages may be given up to the time of the inquisition, where the widow has not yet obtained possession, or up to such latter time where she has (*s*). Time to which they are assessed.

Where the heir dies after judgment against him, and before assessment of damages, the widow cannot have a *scire facias* to recover these damages against his heir, or the alienee, if the land has been sold; because the statute gives damages against *deforciatores*, that is, expellers by force; and neither the alienee nor the heir of the heir is in that case (*t*). And so in the converse case, when the widow dies after judgment, and before execution of the writ of inquiry, the executor cannot recover damages. If they had been ascertained upon the writ of inquiry, and judgment thereupon in her lifetime, they had then vested in the demandant as a debt, and the executor should have had them; but she dying before the final judgment, and when the damages were due to her only by way of satisfaction for an injury, which is in the nature of a trespass, and the writ of inquiry being in the nature of a personal action for them, it dies with the person (*u*). Effect of death of heir; Or widow.

No arrears of dower, nor any damages on account of such arrears, shall be recoverable for more than six years (*x*). Limitation.

3. [Proceedings in *quare impedit* are now commenced by writ of summons in the ordinary form endorsed with notice that the plaintiff intends to declare in *quare impedit*, and are subject to the rules and practice of ordinary actions (*y*).] Previous to the stat. 2 Westm. II. c. 5 (*z*), the plaintiff in a *quare impedit* recovered no damages, lest any profit the patron should take should savour of simony; and this is the cause Quare impedit.

(*r*) *Penrice* v. *Penrice*, *ubi sup.*
(*s*) *Thynne* v. *Thynne*, Hargr. Co. Litt. 32 b. n. 4; *Walker* v. *Nevil*, 1 Leon. 56; *Jones* v. *Jones*, 2 C. & J. 601.
(*t*) *Alsworth* v. *Roberts*, 1 Lev. 38.
(*u*) *Mordant* v. *Thorold*, 3 Lev. 275; 1 Salk. 252, S. C.
(*x*) 3 & 4 W. IV. c. 27, s. 41.
[(*y*) C. L. P. Act, 1860; 23 & 24 Vict. c. 60, ss. 26, 27.]
(*z*) 13 Ed. I. c. 5, s. 3.

that the king in a *quare impedit* recovers no damages, because he is not within the purview of this act (*a*).

The above statute enacts, "that from henceforth in writs of *quare impedit* damages shall be awarded, to wit, if the time of six months shall pass by the disturbance of any person, so that the bishop do collate to the church, and the true patron lose his presentation for that time, damages shall be awarded to two years' value of the church; and if the time of six months shall not pass, but the presentment be deraigned within the said time, then damages shall be awarded to half a year's value of the church."

The value of the church, in computing damages in an action of *quare impedit*, is always to be estimated at what the church might have been let for (*b*).

If six months have passed since the church became void, and the bishop have not collated, the plaintiff in an action of *quare impedit* has an election to pray a writ to the bishop; in which case, as he does not lose his presentation for that time, he can only recover damages to the amount of half a year's value of the church; or as the right of collating has accrued to the bishop, he may proceed in the action, in order to recover damages to the amount of two years' value of the church; but if he elect to do the latter he loses his presentation for that time (*c*).

If six months have passed since the church became void, and the bishop have collated, yet if the incumbent be afterwards removed, in consequence of a judgment in an action of *quare impedit*, damages can only be recovered to the amount of a half year's value of the church; because the plaintiff does not in this case lose his presentation for that time (*d*). And where the plaintiff's clerk had been admitted and inducted, and remained in possession for more than half a year, until he was turned out by a writ of restitution, the Court refused to give full damages (*e*).

Damages are recoverable in an action of *quare impedit*

(*a*) 2 Inst. 362.
(*b*) 2 Inst. 363.
(*c*) *Ibid.*; *Bishop of Exeter* v. *Freake*, 1 Lutw. 901; *Holt* v. *Holland*, 3 Lev. 59, *contrà*.
(*d*) 2 Inst. 363.
(*e*) *Earl of Pembroke* v. *Bostock*, Cro. Car. 174.

against every disturber of the patron in his right of presenting (*f*); therefore in *quare impedit* against the patron and incumbent, where the plaintiff has recovered the advowson after the lapse of six months, if the incumbent has counterpleaded the title of the plaintiff, the two years' value may be recovered against him as well as against the patron (*g*).

"Six months," how construed.

The words "six months" in the above statute are to be understood to be six calendar months, being clearly equivalent to the half year spoken of in the same clause (*h*). When judgment was given within six months, but, before the writ could be served upon the bishop, that period had expired, upon which he collated by lapse, it was held that only damages for the half year could be recovered (*i*).

But where upon the foundation of a chauntry the composition was, that if the patron present not within a month the ordinary shall collate; in a *quare impedit*, brought for this chauntry, if the month be past, the plaintiff shall recover damages for two years within the equity of the statute, because the patron in such a case loses the presentation, though six months have not elapsed (*k*).

Where no actual loss.

When the plaintiff recovered in *quare impedit*, and there was no other disturbance but the presentation of the king who had revoked it, and no disturbance by the incumbent, the plaintiff was held not entitled to damages (*l*). But it was said by Newton, J., that a man shall recover damages in *quare impedit* where he was never disturbed; and Ashton, J., laid it down, that if I present and my clerk is inducted, and J. N. brings *quare impedit* against me for this, and after is nonsuited, I shall have damages (*m*).

When two years' value may be recovered.

When the plaintiff brought *quare impedit* against the bishop, and also against J. T. of the same church, and the bishop confessed the disturbance, and J. T. traversed the title of the plaintiff, which was found for the plaintiff; the plaintiff claimed a writ to the bishop, and two years' value, the six

(*f*) 2 Inst. 363.
(*g*) 2 Inst. 363.
(*h*) *Tullet* v. *Winfield*, 3 Burr. 1455.
(*i*) 2 Inst. 363.
(*k*) 2 Inst. 362.
(*l*) Br. Dam. pl. 171.
(*m*) Br. Quare Impedit, pl. 83; citing 22 H. VI. 25.

months having expired. Thorp, J., said, you cannot have the value of two years and writ to the bishop; and because the ordinary cannot have the lapse where he confesses the disturbance, it was awarded that the plaintiff should have writ to the bishop, and damages of half a year (*n*).

Action of account.

4. No damages are recoverable in an action of account, where the defendant does not plead, but submits to have the account taken (*o*), for the plaintiff virtually obtains damages to the extent of the sum found by the auditors to be in arrear, when the account is taken before them (*p*). But where the defendant has pleaded to the issue, which is found against him, as for instance, where he denied having been the plaintiff's receiver, damages may be given against him on account of the delay (*q*); and accordingly it has been said to be clear law, that in an account a man shall recover damages on the second judgment (*r*). But where a receiver was ordered to account, and wilfully lay in prison for two or three years, this was held not to entitle the plaintiff to recover anything for profits during the time he so lay (*s*).

There are contradictory decisions as to whether a receiver, who has received goods to trade with, can be rendered liable for the profits which he might have made, but did not (*t*). On principle, however, it seems that such a source of damage would be too speculative and remote to be allowed for.

(*n*) Br. Qu. Imped. pl. 103. See the three last cases cited in 17 Vin. Abr. 465—467, ed. 1743.
(*o*) Br. Dam. pl. 136, 166; 1 Roll. Abr. 575, pl. 17, 18, 29.
(*p*) Fitz. Dam. pl. 19; *Collet's Case*, 3 Leon. 230.
(*q*) 1 Roll. Abr. 575, pl. 30; *Brown* v. *Barwick*, Noy, 134.
(*r*) March. 99, pl. 171.
(*s*) 1 Roll. Abr. 576, pl. 31.
(*t*) *Collet's Case*, 3 Leon. 330; 1 Roll. Abr. 575, pl. 27, 28.

CHAPTER XIII.

I. Trover.
II. Detinue.
III. Trespass to goods.
IV. Replevin.
V. Illegal Distress.

WE now pass from contracts and real actions to the wide region of torts. Here we are at once struck by the fact that damages are no longer an invariable matter of calculation, but in many cases are committed almost entirely to the discretion of the jury. Even here, however, as was remarked before (*ante*, p. 23), the jury are never left wholly to their own caprice. They are always to keep certain principles in view, while forming their estimate, and sometimes these principles can be applied with such accuracy as to make their verdict a mere matter of arithmetic.

Actions of tort comprise all injuries to property, person, or character. The first class are always capable of strict valuation; the second are so frequently, but not always; the third probably never. It will be most convenient to adopt the old rule of method, and proceed from that which is more certain to that which is less so; and as actions in respect of goods are more frequent than those in respect of land, we shall begin with the former.

Damages in trover are given for the conversion.

I. One of the most ordinary actions for the recovery of goods is that of trover. The gist of this action is the wrongful conversion of the property to the defendant's own use, and not, as in trespass, the original wrongful taking (*a*); consequently the measure of damages is in general the value of the goods. The manner in which they were obtained is immaterial. The only point of difficulty is in ascertaining the value, where it has

(*a*) Bac. Ab. *Trover*, A.

varied at different times, or where any circumstances prevent precise proof.

Mode of calculating value where there has been a change in the price.

Where the article has fluctuated in price, it is by no means settled in England whether it is to be estimated at its value at the time of conversion, or at any later time. The value of a bill of exchange, for instance, is perpetually changing according as interest accumulates upon it. In one case, Lord Ellenborough directed that interest should only be allowed up to the time of conversion (*b*); but this decision was subsequently denied to be law by Abbott, C. J. (*c*). That was an action of trover for East India Company's warrants for cotton. Evidence was given that at the time of the conversion the cotton was worth 6*d.* per lb., but at the trial it was worth 10½*d.* He ruled that the jury were not limited to the former value, saying, "The jury may give the value at the time of the conversion, or at any subsequent time, at their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained." And this rule is fortified by the analogy of actions for not replacing stock, in which we have seen that the measure of damages, where there has been a rise in price, is not the value at the time it ought to have been delivered, but at the time of trial (*d*).

Rule in America.

In America there is as usual a conflict of law. The high authority of Kent J. ranks in support of the doctrine of Lord Tenterden. He said, in one case, "The value of the chattel at the time of the conversion is not in all cases the rule of damages in trover. If the thing be of a determinate and fixed value it may be the rule; but where there is an uncertainty or fluctuation attending the value of the chattel, and it afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it at the time he calls upon the defendant to restore it; and one of the cases even carries down this value to the time of trial" (*e*). On the other hand Story J. laid it down, "that the true rule is the value of the property at the market price at the time of the conversion" (*f*).

(*b*) *Mercer* v. *Jones*, 3 Camp. 477.
(*c*) *Greening* v. *Wilkinson*, 1 C. & P. 625.
(*d*) See *ante*, p. 123.
(*e*) *Cortelyou* v. *Lansing*, 2 Caines' Ca., 200; *West* v. *Wentworth*, 3 Cowen, 82.
(*f*) *Watt* v. *Potter*, 2 Mason, 77.

And this is the doctrine acted upon in Massachusetts (*g*). Mr. Sedgwick takes the same view, "unless the plaintiff has been deprived of some particular use of his property, of which the other party was apprised, and which he may be thus said to have directly prevented" (*h*).

It is evident that the decisions in *Mercer* v. *Jones* and *Greening* v. *Wilkinson*, cited above, are not so completely the converse of each other, as that one must necessarily be right because the other is wrong. Whatever the rule may be in the case of goods, whose price has changed since the conversion, I conceive that damages in trover for a bill of exchange should always include interest up to the time of verdict, if the bill itself bore interest. There is no real analogy between the increase in value of a bill, from the accumulation of interest upon it, and the increase in value of goods, from a rise in their price. The former increase is merely a compensation for the loss undergone by delay in the payment of the debt which the bill represents. The latter increase is simply a gratuitous and accidental bonus, obtained by the holder of the goods; consequently, if, in trover for goods, damages were fixed at the time of their conversion, although their rightful owner might be deprived of a profit, still it would be a profit which he might never have acquired, and for which he gave no consideration; which was not, in fact, part of his contract in purchasing the goods. On the other hand, if the same rule were adopted in trover for a bill, the plaintiff would be deprived of all interest on his debt from the time of conversion up to the time of trial; he would be put in a worse position than he could possibly have been in, had the wrongful act never been committed; and his loss would be one against which he had expressly contracted when taking the bill, and which must have been contemplated by the party who appropriated it.

I am not aware of any case directly affirming or denying the authority of *Greening* v. *Wilkinson* (*i*). The question of damages in trover arose again in a modern case, under the following circumstances. The master of a ship, which was

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(*g*) *Kennedy* v. *Whitwell*, 4 Pick. 466.
(*h*) Sedg. Dam. 505, [559, 4th ed.].
[(*i*) Maule, J., is reported to have spoken of it as "hardly consistent with the modern doctrine;" *Reid* v. *Fairbanks*, 13 C. B. at p. 728.]

disabled so as to be unable to carry on its cargo, sold it at Bahia. The shipowner tendered the price for which the goods sold, minus general average and other expenses, to their owner who brought trover. The goods had sold very low, and the jury were directed to give as damages, not the price for which they had sold, but the invoice price, and the amount paid for freight. Wilde, C. J., said, "The question for the jury was, what was the amount of damage the plaintiff had sustained by the unauthorised sale of the salt at Bahia. They found that the value of the salt to the plaintiff at the time of the sale was the invoice price, and the freight paid for carriage. I cannot say that they have done wrong. As far as the defendants are concerned it meets the justice of the case, and indeed it hardly amounts to an indemnity to the plaintiff, for he loses the interest of his money." Cresswell, J., said, "I do not see how else they could estimate the value of the goods to the shipper than by taking the last price, and adding the expense incurred in getting the goods towards the merchant. What the cargo fetched by a forced sale at Bahia clearly was no fair test. The plaintiff did not want the goods there" (*k*). The reader, in considering this case, will do well to distinguish between the value of goods, and their selling price. The two are only identical when the owner is under a necessity to sell; or, at all events, anxious to do so. In the present instance, the Court evidently wished to give their value at the time they were sold. But their price at Bahia was no more a criterion of this value, than the price which a carrier could obtain at a roadside public-house for a case of jewels, would be a criterion of *their* value, in an action of trover against him. It does not appear what the value of the goods was at the time of trial, and no point was made to raise the question. The decision seems, however, by implication, to exclude such a measure, and to favour the view taken by Mr. Sedgwick, viz., that the price for which goods might have been sold is a matter of speculative damage, and ought not to be allowed for.

This doctrine seems also to be strongly confirmed by the language of the legislature. The act (*l*) which allows interest in actions of trover and trespass, states that it is to be given

(*k*) *Ewbank* v. *Nutting*, 7 C. B. 797, 809, 811.
(*l*) 3 & 4 W. IV. c. 42, s. 29.

"over and above the value of the goods *at the time of the conversion*," or seizure. This clearly assumes that the conversion is the time in reference to which they are to be valued, and not any subsequent period.

Of course instances might occur in which goods were intended not for mere sale, but for some special purpose, which has been frustrated by their conversion. Loss arising in this manner might, it is apprehended, be recovered as special damage, and ought to be so laid. This point will be the subject of discussion later in the present chapter.

Damages vary according as plaintiff was forced to sell or not.

The same distinction alluded to above, as to whether a plaintiff was, or was not forced to sell, has been relied on as affecting the damages in a different class of cases. I refer to those in which the conversion has been followed by a sale; and the attempt has been to make the selling price conclusive as to the value of the property.

Where goods have been seized and sold after a bankruptcy by some person who fails to maintain title to them, if the sale has been *bonâ fide*, the assignees are only entitled to the amount produced by it, and not to the full value of the goods. For they were themselves bound to sell (*m*), and in such a case, where the action is against the sheriff, the jury may, if they think fit, deduct from the damage his expenses in selling. For the assignees would, in any case, have had to incur them (*n*). But if the assignees could have sold by private contract, or if the sales by the sheriff had taken place in different counties so as to cause unnecessary expense, it would be otherwise (*o*). On the other hand, where the plaintiff was under no necessity to sell, as where her goods were seized under a fi. fa. against a man falsely supposed to be her husband, she was held entitled to the full value of the goods, and not merely the price for which they sold (*p*).

Damages when article has changed its form.

A curious question has been raised in America, as to the value at which an article is to be estimated, which has been changed into some new form by its wrongful taker. In New

(*m*) *Whitmore* v. *Black*, 13 M. & W. 507; *Whitehouse* v. *Atkinson*, 3 C. & P. 344.
(*n*) *Clark* v. *Nicholson*, 6 C. & P. 712; 1 C. M. & R. 724, S. C.
(*o*) *Ibid.*
(*p*) *Glasspoole* v. *Young*, 9 B. & C. 696.

York it has been several times ruled, that the whole value of the article in its new form may be recovered; as, for instance, where timber had been converted into boards, wood into coals, black salts into pearl-ashes (*q*). The doctrine is made to rest on the authority of some old cases. A defendant in trespass pleaded that a third person had entered upon his land, and cut down his trees and made timber of them, and given the timber to the plaintiff. That he had re-taken the timber, which was the trespass complained of. The Court held the plea good, saying, "In all cases in which a thing is taken tortiously and altered in form, if that which remains is the principal part of the substance, so that it may still be identified (*n'est le notice perde*); as for instance, if a man takes my cloak and makes a doublet of it, I may re-take it. And so if a man takes a piece of cloth and then sews a piece of gold to it, I may still re-take it. And if a man takes trees and afterwards makes boards of them, the owner may still re-take them, *quia major pars substantiæ remanet.* But if the trees are planted in the ground, or a house is made of the timber, it is otherwise. Quære (by the reporter) as to the house, for it is the principal substance" (*r*). But it is apprehended that the case is not in point. The right of an owner to re-take his own property, though altered in form and increased in value, when he cannot separate what is his own from that which is added to it, rests upon necessity. It by no means follows that a jury, in giving damages, are bound to give the value of the altered chattel instead of that of the original, when the one value could be severed from the other. The reason no longer exists. The doctrine of the Roman law, upon which ours is founded in this respect, goes no further. It states that in such a case, "Si ea species ad priorem et rudem materiam reduci possit, eum videri dominum esse, qui materiæ dominus fuerit; si non possit reduci, eum potius intelligi dominum, qui fecerit" (*s*). But this merely decides who shall have the property, not what amount of damage shall be received for the alteration. It may be said that if the property of the improved article continues in the original

(*q*) See the cases cited, Sedg. Dam. 508 [565, 4th ed.].
(*r*) F. Moore. 19, pl. 67; and so 5 H. VII. 15; 12 H. VIII. 10.
(*s*) 2 Inst. I. 25.

owner, he must be paid for its detention on its full value. But I conceive that this by no means follows. Where a man mixes his own goods with those of another, so as to be undistinguishable, the property in the entire mass vests in the latter (*t*). But if the former were to carry away the entire mass as soon as he had mixed it, can it be said that the value of all could be recovered in trover? In short, may not the real principle be this: that the property in the improvement never does, in fact, vest in the original owner; but that as his property in the subject-matter continues, he has a right to have it back either in value or in specie; in the latter case the improvements must follow, because they cannot be separated. In the former case they need not.

Cases in which minerals have been severed.

The only English authority, that I am aware of, which seems to oppose this view, is that of a class of cases in which the question has been, as to the mode of valuing minerals wrongfully severed and carried away. The form of action in the first three cases that occurred (*u*) was trespass, and there it was held that the coal should not be estimated at its value as it lay in the bed, but at its price when it first became a chattel, and that no deduction could be made on account of the labour bestowed in digging it. The same rule, however, was extended to an action of trover in another case, where Parke, B., told the jury, that if there was fraud or negligence on the part of the defendant, they might give as damages, under the count in trover, the value of the coals at the time they first became chattels, on the principle laid down in *Martin* v. *Porter*; but that if they thought the defendant acted fairly and honestly, in the full belief that he had a right to do what he did, they might give the full value of the coals as if the coal-field had been purchased from the plaintiff (*x*). But these decisions clearly do not support the American doctrine. The defendant did not bestow any new value upon the coal after he seized it. He merely claimed to be paid for his own unlawful act in taking possession of it. It was just as if a person, sued in trover for furniture, should ask to be allowed

(*t*) Poph. 38; *Ward* v. *Eyre*, 2 Bulst. 323.

(*u*) *Martin* v. *Porter*, 5 M. & W. 352; *Wild* v. *Holt*, 9 M. & W. 672; *Morgan* v. *Powell*, 3 Q. B. 278.

(*x*) *Wood* v. *Morewood*, 3 Q. B. 440, n. [So *Hilton* v. *Woods*, L. R. 4 Eq. 432; 36 L. J. Ch. 941.]

for the expense he had gone to in breaking open the plaintiff's house and picking his locks. No doubt the act of severance gave the coal a greater value than it had while buried in the mine. But this act could not be re-imbursed in either form of action. In trespass it was itself the wrong complained of, and therefore clearly could not be at the same time a ground of counter-claim. On the other hand, the action of trover is equivalent to the plaintiff saying, "You had my leave to sever the coals for my use, but you then wrongfully appropriated them to your own use." Here, too, the severance cannot be allowed for, as there was no contract to that effect, and the damages must be the value of that property which belonged to the plaintiff the moment before the act complained of, viz., the severed coal. In fact, it is hard to see what other damages could be given in trover. It can only be brought in respect of a chattel, and the value of the thing as a chattel, and not in some previous state when it was a fixture, must be the measure of damages. And accordingly in trover for fixtures which have been wrongfully removed, the plaintiff can only recover their value as chattels, though it may be less than their value was as fixtures (*y*). The rule should equally apply where it is for the benefit of the plaintiff and not of the wrong-doer.

On the other hand there are two direct decisions, which probably settle the point. The first was an action of trover against a dyer for cloth given to him to be dyed, who claimed to retain them till the price of dyeing other goods was paid. This was overruled, and the plaintiff had a verdict, but only for the amount of the goods as they were sent to him, in their white state (*z*). This of course is not conclusive, as the work was done by the plaintiff's orders, and the defendant had a lien to that extent. A recent case, however, goes much farther. Trover was brought for a ship, the property of the plaintiff, which had been in an unfinished state at the time of the conversion, but was afterwards completed and sent to sea by the defendant. The plaintiff claimed its full value when finished, on the authority of *Martin* v. *Porter*. The Court

(*y*) *Clarke* v. *Holford*, 2 C. & K. 540.

(*z*) *Green* v. *Farmer*, 4 Burr. 2214. [So *Hyde* v. *Cookson*, 21 Barbour, (N. Y.), 92.]

of Common Pleas ruled, that the damages were its value at the time of conversion, which might be ascertained by taking its value at the place where it was built, when completed according to contract, and deducting the amount which it would have been necessary to lay out for that purpose after the conversion. Maule, J., said, in the course of the argument, "Although it be true that in trover the owner may recover for the conversion of the improved chattel, it does not follow that he is entitled to recover the improved value as damages. The proper amount of damages is the amount of pecuniary loss which the plaintiffs have been put to by the defendant's conduct" (*a*).

Where goods deposited with defendant under void contract.

Where the plaintiff has deposited or transferred goods to the defendant on a contract, which is void *ab initio*, *e. g.* for usury, he may recover them in trover (*b*). And in such a case the full value of the goods must be given as damages, without deducting the amount actually paid to the plaintiff in pursuance of such contract (*c*).

Presumption as to value in certain cases.

When the defendant in trover will not produce the article, it will be presumed against him to be of the greatest value that an article of that species can be (*d*). And on the same principle, where part of a diamond necklace, which had been lost by the plaintiff, was traced into the possession of the defendant, who could not account satisfactorily for having it, and did not swear positively that the whole set had not come into his hands, the jury were directed to presume that the whole necklace had been in his custody, and to give damages accordingly (*e*). In all other cases, however, the plaintiff must strictly prove the amount taken, and its value, even though the conversion be admitted by the pleadings. Otherwise there would be no evidence of damage more than nominal (*f*).

Value when sold.

Where goods are sold under a distress, the appraised value is never conclusive as to their worth, unless the jury are satisfied that the best means were taken to ascertain the

(*a*) *Reid* v. *Fairbanks*, 13 C. B. 692; 22 L. J. C. P. 206, S. C.
(*b*) *Tregoning* v. *Attenborough*, 7 Bingh. 97; [*Hely* v. *Hicks*, 3 Ir. L. R. 92.]
(*c*) *Hargreaves* v. *Hutchinson*, 2 Ad. & Ell. 12.
(*d*) *Armory* v. *Delamirie*, 1 Stra. 504; 1 Sm. L. Ca. 315, 6th ed.
(*e*) *Mortimer* v. *Cradock*, 12 L. J. C. P. 166.
(*f*) *Cook* v. *Hartle*, 8 C. & P. 568.

value; and the fact that they sold for no more makes no difference (*g*).

Trover for title deeds.

In trover for title deeds, the jury give the full value of the estate to which they belong by way of damages, which, however, are generally reduced to 40*s.* on the deeds being given up (*h*).

Bills and notes.

In actions for the recovery of bills, the amount of the bill is also the measure of damages (*i*). It is no ground for reducing the damages that after the conversion the defendant has by his own act lessened the value of the bill, by procuring part of it to be paid (*k*). But in such a case, if he brought into Court the bill, and the money he had received in part payment of it, the verdict might be entered for a nominal sum (*l*). In another case the bills in question had been issued by the government of Peru, at the interposition of the British government, to the plaintiff, as compensation for detention of his ship, and were retained by the defendant, and a verdict found against him for the full value of the bills. The bills at the place where they were payable were at a discount of 60 to 70 per cent. and were of no value at all in England, where the action was brought. The plaintiff by affidavits showed, that the bills would in his hands be worth the full amount they represented, being backed by the weight of the British government. The Court directed that they should be taken as worth the full amount of dollars they represented, and that as to the value of the dollars, the plaintiff should be in the same situation as if the bills were drawn on a house of unquestionable solidity in Lima, the place of payment. The net amount recoverable was to be the value of such a bill in London, taking into account the rate of exchange resulting

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(*g*) *Clarke* v. *Holford*, 2 C. & K. 504, and see *ante*, p. 288.

(*h*) *Loosemore* v. *Radford*, 9 M. & W. 659; *Coombe* v. *Sansom*, 1 Dowl. & Ry. 201.

[(*i*) Numerous decisions in America have settled what seems to be the true rule, that the measure of damages is *primâ facie* the amount of the bill or note, but the insolvency of the parties liable thereon, payment in whole or in part, or any other facts tending directly to reduce its value, may be shown in mitigation of damages. See 2 Parsons on Contracts, 471; *Potter* v. *Merchants' Bank*, 28 N. Y., 641; *Walrod* v. *Ball*, 9 Barb. (N. Y.), 271; Sedg. Dam. 569, 4th ed.]

(*k*) *Alsager* v. *Close*, 10 M. & W. 576. [As to interest, see *ante*, p. 287, and *post*, p. 296.]

(*l*) *Ibid.*, 584.

from the expense and risk of transfer between Lima and London (*m*).

Damages when security is void.

If the security is void at the time of the conversion, and not by any act of the defendants, only nominal damages can be recovered. This was held in two curious cases where in fact the security, though void, turned out to be of value. A bankrupt delivered a cheque on his bankers after bankruptcy to a creditor, who obtained the money on it. The assignees brought trover for the cheque. The jury gave the full amount of the cheque, and their verdict was set aside. Mansfield, C. J., said, "The plaintiffs proceed on the ground that the cheque is worth nothing, being drawn without their authority; how then can they recover on it the sum of 300*l*?" (*n*). In the second case, the plaintiff had assigned a policy of insurance to the defendant, as security for the debt. After the assignment it turned out that the policy was utterly void. This was admitted by both plaintiff and defendant. The company, however, paid the defendant a certain sum upon it, merely as a gratuity, upon his giving it up to be cancelled. In an action of trover it was held that the full amount of the policy could not be recovered, because it was confessedly bad; nor the sum paid to the defendant, for this was merely a gratuity. But that as he had retained the actual document after his right to do so had ceased, the plaintiff was entitled to a verdict with nominal damages for the parchment (*o*).

By the act of the defendant.

But where the worthlessness of the document arises from the defendant's own wrongful act in mutilating it, as where the action was for an unstamped guarantie for "half the amount of certain fixtures, say about 100*l*.," from which the defendant had erased his signature, the jury were held to have been justified in giving the full 100*l*. as damages. And it was no misdirection that they were not told to find in the alternative, that the damages should be nominal on the memorandum being given up, because the defendant's own act had prevented such a course being just (*p*).

The same doctrine of estoppel was carried to a remarkable

(*m*) *Delegal* v. *Naylor*, 7 Bingh. 460.
(*n*) *Mathew* v. *Sherwell*, 2 Taunt. 439.
(*o*) *Wills* v. *Wells*, 2 Moore, 247; 8 Taunt. 264, S. C.
(*p*) *M'Leod* v. *M'Ghie*, 2 Sco. N. R. 605; 2 M. & G. 326.

extent in one instance, when the plaintiff was allowed to recover in respect of a chattel which had never existed. An agent had been employed to effect an insurance, and had asserted that he had done so, which was not the fact. The principal brought trover for the policy. Lord Mansfield refused to allow the defendant to contradict his own representation, and held that the same damages should be given as if the policy had been really effected (*q*). "I shall consider the defendant," he said, "as the actual insurer, and therefore the plaintiff must prove his interest and loss."

Interest.

The jury may, if they think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion (*r*). Even independently of this statute they were allowed to give interest on a bill of exchange (*s*), probably on the principle that as a bill by its nature bears interest, its value must be compounded of the amount for which it is given, and the interest of which the plaintiff is deprived by its conversion.

Special damage.

Special damage may be recovered in this form of action if laid, but not otherwise. In trover for carpenter's tools, where the declaration stated that the plaintiff had been prevented working at his trade, 10*l.* above the value of the articles was given (*t*). And similarly, in trover for a pony, where the damage was that the plaintiff had been forced to hire other horses instead (*u*). And in a recent case, Cresswell, J., said that consequential damage might arise where a party whose property had been converted was under a contract to sell it (*x*). The special damage must, however, be the necessary

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(*q*) *Harding* v. *Carter*, Park. Ins. 4.

(*r*) 3 & 4 W. IV. c. 42, s. 29.

(*s*) *Paine* v. *Pritchard*, 2 C. & P. 558. See as to the time up to which interest is allowed, *ante*, p. 286.

(*t*) *Bodley* v. *Reynolds*, 8 Q. B. 779.

(*u*) *Davis* v. *Oswell*, 7 C. & P. 804.

(*x*) *Reid* v. *Fairbanks*, 13 C. B. 692; 22 L. J. C. P. 206, 208. [See also *Wood* v. *Bell*, 5 E. & B. 772; 25 L. J. Q. B. 148, in Q. B. Quite recently a plaintiff who had bought champagne, which could not be got elsewhere, at fourteen shillings per dozen, and had contracted to sell it at twenty-four shillings to a person about to leave England immediately, recovered as damages in trover against one who wrongfully converted the wine, the price at which he had contracted to sell it, although the defendant had no notice of the sale. The Court of Queen's Bench drew a distinction between special damage and special value, and said that they were inclined to think that to enable a plaintiff to recover special damage which did not form part of the

consequence of the defendant's act, and must be the immediate, not the remote, result of it. The first of these requisites may be illustrated by a case which arose between the sheriff and assignees in bankruptcy. The sheriff seized the bankrupt's goods under a fi. fa. and placed his man in possession upon the premises. Subsequently the messenger under the commission took charge of the goods, but the sheriff's officer still remained. Later still a formal demand was made upon the sheriff, and finally the goods were given up to the assignees, and accepted unconditionally. They sued in trover for the conversion, without laying special damage; and sought to recover the rent of the premises for the quarter, during which the goods had been lying there in charge of the sheriff, and for the expenses of the messenger. Part of the rent had accrued before their messenger had entered, and before any demand of the goods. No proof was offered that the rent could be apportioned, or that they could have given up the premises, even if the sheriff had not been there. It was held that these sums could not be recovered at all, as they had not been specially laid; and Tindal, C. J., doubted whether they could, in any way, fall within the remedy of an action of trover, not being a damage necessarily consequent on the wrongful conversion of the goods (*y*). As to remoteness of damage, I may refer to a case already cited (*z*), where in trover for a ship, the Court decided that the plaintiff could not claim as damages the freight he would have earned on the next voyage; and Maule, J., said that must be included in the value of the ship itself. People would not pay for a ship that could not earn freight.

Action for seizure under the Customs Act.

Where an action shall have been brought on account of the seizure of any goods, seized as forfeited under any Act relating to the Customs, and a verdict given against the defendant; if the judge shall certify that there was a probable cause for the

actual present value of the goods, as in the case of withholding the tools of a man's trade, (*Bodley* v. *Reynolds*, *supra*,) the defendant must have some notice of the inconvenience likely to be occasioned, but no notice could be necessary where a special value was attached by special circumstances to the article converted. Notice could not affect that value, though it might affect the conduct of the wrong-doer. *France* v. *Gaudet*, L. R. 6 Q. B. 199; 40 L. J. Q. B. 121.]

(*y*) *Moon* v. *Raphael*, 2 Bingh. N. C. 310, 315.

(*z*) *Reid* v. *Fairbanks*, *ubi sup.*

seizure, the plaintiff shall only be entitled to [2*d.* damages, and to no costs of suit (*a*).]

Mitigation of damages.

Having pointed out the principal rules as to the measure of damages in this action, it will be necessary to examine what circumstances will reduce them. One of the principal of these arises out of a partial title.

Want of title.

Want of title must always be specially pleaded, and no evidence can be given under the general issue, even in mitigation of damages, to show that the property really belonged to another person (*b*). Where there is a proper plea, however, anything which goes to diminish the extent of the plaintiff's interest will go in reduction of the verdict; as, for instance, proof that the parties named in the plaintiff's lease as lessors had not all signed it (*c*); or that the plaintiff had only a share in the chattel sued for, in which case he can only recover the amount of his share (*d*). And so where the plaintiff was merely nominal owner of the goods, and had become so to defeat the creditors of his brother, the real owner; Erle, J., being of opinion that the whole arrangement was a mere scheme to baffle justice, directed the jury to take, as the measure of damages, the plaintiff's real and bonâ fide interest in the goods in question, and not their full value; upon which a verdict of ¼*d.* was returned (*e*). The same view was taken in another case arising out of different circumstances. The plaintiff had assigned his goods to the defendant to secure a debt, subject to a proviso that they should remain in the plaintiff's possession till default of payment, or till a particular notice was given by the defendant. The defendant seized the goods before either of these conditions was complied with. It was held that the plaintiff might sue him, but that the value of the goods, as between the parties, was not the proper measure of damages. The plaintiff could only recover an amount proportioned to his interest in them at the

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[(*a*) The Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, s. 312. S. 353 of this Act repeals 8 & 9 Vict. c. 87, s. 116, cited in the first edition.]

(*b*) *Finch* v. *Blount*, 7 C. & P. 478; *Jones* v. *Davies*, 6 Exch. 663.

(*c*) *Taylor* v. *Parry*, 1 M. & Gr. 604.

(*d*) *Nelthorpe* v. *Dorrington*, 2 Lev. 113; *Dockwray* v. *Dickenson*, Skinn. 640; *Addison* v. *Overend*, 6 T. R. 766; *Sedgworth* v. *Overend*, 7 T. R. 279; *Bloxam* v. *Hubbard*, 5 East, 407; [*Johnson* v. *Stear*, 15 C. B. N. S. at p. 337; 33 L. J. C. P. at p. 133, *per* Williams, J.]

(*e*) *Cameron* v. *Wynch*, 2 C. & K. 264.

time of the taking (*f*). This was an action of trespass, but the Court said that trover would equally have lain, and the principle as to damages would clearly not be affected.

Johnson v. *Stear.*

[More recently the assignee of a bankrupt brought trover for brandies, the dock warrant for which had been deposited by the bankrupt with the defendant as security for a loan, to be repaid on the 29th of January, or, in default, the brandies to be forfeited. On the 28th, after the bankruptcy, the defendant agreed for the sale of the brandies, and on the 29th he delivered the dock warrant to the purchaser, who took possession on the 30th. This was held to be a wrongful conversion by the defendant; but as the value of the brandies did not exceed the amount of the loan, the majority of the Court of Common Pleas were of opinion that the plaintiff could recover only nominal damages. They considered that the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under the contract; that if the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, the compensation to which he would have been entitled would have been a nominal sum only; and that although the plaintiff's action was in name for wrongful conversion, yet in substance the cause of action was the same, and the change in the form of pleading ought not to affect the amount of compensation. Therefore the damages were to be measured by the loss really sustained, and in measuring them the interest of the defendant in the pledge at the time of the conversion was to be taken into the account (*g*). Williams, J., dissented on the ground that the defendant's lien was annihilated by his wrongfully parting with the goods, and thereupon the owner's right to possession revived and he was entitled to recover the full value as damages in an action of trover. The judgment of

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(*f*) *Brierly* v. *Kendall*, 17 Q. B. 937; 21 L. J. Q. B. 161. [So *Toms* v. *Wilson*, 4 B. & S. 455; 32 L. J. Q. B. 382, in Ex. Ch.; and see *Massey* v. *Sladen*, L. R. 4 Ex. 13; 38 L. J. Ex. 34.]

[(*g*) *Johnson* v. *Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130. This case was much discussed in *Donald* v. *Suckling*, L. R. 1 Q. B. 585; 35 L. J. Q. B. 232, but mainly upon the question whether the parting with the goods by the pledgee put an end to the contract of pledge so as to entitle the pledgor to possession.]

the Court was, however, adopted by the Court of Exchequer Chamber in a subsequent case (*h*).]

Damages in action by bailee, &c.

Exactly the same rule applies where the plaintiff is not the actual owner, but only a bailee, or person holding under a lien. Where goods are taken from under his control, either by a stranger, or by the general owner whose right to the possession has not been restored, he may sue in trover or trespass. His damages against the stranger will be the entire value of the thing, because he is liable over to the owner; but in an action against the owner, he can only recover the amount of his interest in it (*i*). [And so if an unpaid vendor of goods, which are left in his custody by the vendee, wrongfully and without any default on the part of the vendee, sells and delivers them to another person, as he thereby loses his right to sue the first vendee for the price, the latter will not be entitled to recover from him in trover the full value of the goods, but only that amount diminished by what he would have had to pay the vendor for them (*k*). Against a wrongdoer not claiming under the vendor he would have been entitled to the full value (*l*).]

Damages in action against unpaid vendor.

Cost of keep of an animal.

Where the proprietor of land seized an animal, as damage feasant, under circumstances which made the seizure wrongful, and after feeding it for several days sold it, the owner was held entitled to the full value of the animal in trover, without any deduction for the feeding (*m*).

Reversioner.

[Where a chattel has been let to hire, the owner cannot sue in trover for it, because he has parted with the right to the possession. He may, however, maintain an action against a third person for a permanent injury to it (*n*).]

[(*h*) *Halliday* v. *Holgate*, L. R. 3 Ex. 299; 37 L. J. Ex. 174.]

(*i*) *Heydon's Case*, 13 Rep. 69; Stor. Bailm. s. 352; *per* Crompton, J., *Waters* v. *Monarch Assurance Co.*, 25 L. J. Q. B. 102, 106; [*Parish* v. *Wheeler*, 22 N. Y., 494; *Swire* v. *Leach*, 18 C. B. N. S. 479; 34 L. J. C. P. 150; *White* v. *Webb*, 15 Conn. 302; *Ullman* v. *Barnard*, 73 Mass. 554.]

[(*k*) *Chinery* v. *Viall*, 5 H. & N. 288; 29 L. J. Ex. 180. See *post*, p. 314. Where a sale was conditional, and part of the purchase-money was paid, and the chattel was handed over to the vendee, the vendor was held, in America, entitled, on the condition not being performed, to recover in trover the full value, without any deduction for the partial payment, *Brown* v. *Haynes*, 52 Maine, 578; *Angier* v. *Taunton Paper Co.*, 67 Mass. 621.]

[(*l*) *Turner* v. *Hardcastle*, 11 C. B. N. S. 683; 31 L. J. C. P. 193.]

(*m*) *Wormer* v. *Biggs*, 2 C & K. 31. See [17 & 18 Vict. c. 60, s. 1], as to the right to sell a distress damage feasant for the expenses of its keep.

[(*n*) *Mears* v. *London and S. W. Ry Co.*, 11 C. B. N. S. 850; 31 L. J. C. P. 220.]

Right of action against third parties.

It was stated *obiter* in one case, that where goods were converted under circumstances which gave the plaintiff a right of suing different parties, the jury might reasonably give small damages against one, on the ground that an action would lie against the other (*o*). This seems a curious reason for mitigating damages. I have noticed the dictum in a previous chapter (*p*), and ventured, with great deference, to offer some objections to it.

Re-delivery of property.

If the defendant, after conversion, re-deliver the goods, an action will still lie for the original conversion, and the re-delivery will only go in mitigation of damages (*q*). But the jury need not give more than nominal damages, even where the re-delivery has been after action brought; unless actual damage has been occasioned either by an injury to the property converted, or by the actual and necessary consequences of the conversion; as where money has been necessarily paid to recover the chattel (*r*) In trover against a carrier, it appeared that he had offered to deliver the goods two days after they ought to have been delivered; and that the plaintiffs, thinking they had incurred loss by the delay, refused to receive them, and sued in this form. Defendant paid the price of the goods and the costs into Court, and pleaded no damage ultra, which the jury found for him. A motion for new trial was made on the ground, that in any case the plaintiff was entitled beyond the value of the goods to nominal damages for the conversion, but the rule was refused. Lord Abinger assented to the principle laid down, but said the jury were not bound by the cost price. And so, *non constat* but the sum paid in did, in their estimation, include damages (*s*).

[Applying the goods in a manner which may be for the owner's benefit, but is not in accordance with his wishes, is not a re-delivery going in mitigation of damages. Therefore where the defendant had obtained a judgment against the plaintiff and having goods of the plaintiff in his possession, wrongfully refused to give them up, and then issued execution on his judg-

(*o*) *Per* Bayley, J., *Morris* v. *Robinson*, 3 B. & C. 205; and *per* Holroyd, J., *ibid.*, 206.
(*p*) *Ante*, p. 67.
(*q*) Bull, N. P. 46.
(*r*) *Moon* v. *Raphael*, 2 Bingh. N. C. 315; *per* Tindal, C. J.
(*s*) *Evans* v. *Lewis*, 3 Dowl. 820.

ment and seized and sold the goods and applied the proceeds in satisfaction of the debt, it was held that the plaintiff was entitled in trover to recover the full value of the goods, and that the jury ought not to take into consideration in mitigation of damages the fact that the goods had been subsequently applied in satisfaction of the plaintiff's debt to the defendant (*t*).]

Verdict by consent.

Where the defendant is willing to deliver up the chattels, the verdict is generally entered by consent at the value of the thing, but only 1*s.* to be levied upon its being given up (*u*). But this is merely matter of arrangement between the parties; and if the subject-matter has been so injured as that justice would not be effected by returning it, the verdict will be absolute for the entire value (*x*). In a case where equity would relieve the defendant against the verdict, as where, in trover for title deeds, the whole value of the estate has been given, the Court will, with the plaintiff's consent, order satisfaction to be entered upon the defendant's returning the deeds, paying full costs of the action as between attorney and client, and all other proceedings caused by his own wrongful act, and submitting to such other terms as would be a full indemnity to the plaintiff (*y*).

Reducing damages after verdict.

Even after trial and verdict, the Court will exercise its equitable power in reducing the damages, when any subsequent matter has rendered it unjust that the whole amount should be recovered. A verdict in trover for goods was obtained against a party. After verdict, and before the goods were removed from the house in which they were, and for the rent of which the plaintiff was liable, they were distrained on by the landlord; Tindal, C. J., said, "The case falls within a principle well known and recognised in Westminster Hall. The plaintiff has recovered damages in action of tort; the defendant has in effect satisfied them pro tanto, and he comes to us to allow this amount towards satisfying the judgment. The parties are in the same situation as if the defendant had gone to the plaintiff after the verdict, and paid him the sum distrained for" (*z*).

[(*t*) *Edmondson* v. *Nuttall*, 17 C. B. N. S. 280; 34 L. J. C. P. 102.]
(*u*) *Wintle* v. *Rudge*, 5 Jur. 274.
(*x*) *M'Leod* v. *M'Ghie*, 2 Sco. N. R. 605; 2 M. & G. 326.
(*y*) *Coombe* v. *Sansom*, 1 Dow. & Ry. 201.
(*z*) *Plevin* v. *Henshall*, 10 Bingh. 24.

Staying proceedings.

In some cases the Court will stay proceedings without going to trial, upon delivery of the thing claimed and payment of costs. The rule is thus laid down in *Fisher* v. *Prince* (*a*), "that where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damage, there the specific thing demanded may be brought into Court. But where there is an uncertainty either as to the quantity or quality of the thing demanded, or there is any tort accompanying it that may enhance the damage above the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall not be brought in" (*b*). In one case of trover for a horse the Court refused a rule to stay proceedings on delivering him up with costs, though the application was made on an affidavit that his condition was improved; and they said *Fisher* v. *Prince* was no authority for the rule asked (*c*). Probably the plaintiff sought damages for the detention beyond the mere value of the animal. But in such a case, as where the action was for a promissory note, said to be dishonoured, the Court will only allow the plaintiff to proceed for actual damage, but not for mere nominal damage for its detention (*d*).

Staying proceedings as to some articles where the claim is for several.

Even where there are several things claimed, the Court will make a rule as to any one of them, if the circumstances relating to it come within the principle above stated. The terms of the rule are, that on delivering up the articles in question, and paying costs of the cause and the appearance up to that time, the proceedings shall be stayed, if the plaintiff will accept of such discharge of the action. If not, that the articles delivered up shall be struck out of the declaration, and the plaintiff be subject to costs unless he shall obtain a verdict for the remainder of the goods claimed, or more than nominal damages for the detention of those given up (*e*).

(*a*) 3 Burr. 1364.

(*b*) And see *Whitten* v. *Fuller*, 2 W. Bl. 902; *Tucker* v. *Wright*, 3 Bingh. 601; *Gibson* v. *Humphrey*, 1 C. & M. 544.

(*c*) *Makinson* v *Rawlinson*, 9 Price, 460.

(*d*) *Moss* v. *Thwaite*, 1 Tidd. Prac. 545, 9th ed.

(*e*) *Brunsdon* v. *Austin*, 1 Tidd. Prac. 9th ed., 545; *Earle* v. *Holderness*, 4 Bingh. 462; *Peacock* v. *Nichols*, 8 Dowl. 367.

Damages for detention.

Substantial damages will be given for the detention of an article which has fallen in value between the time it was taken and the time it was returned. The action was detinue for railway scrip, which was delivered up under an order in the above terms. The plaintiff proceeded to trial, and proved that at the time of demand the scrip-certificates were worth 3*l.* 5*s.* each, but only 1*l.* at the time of the delivery. The judge directed the jury that the true measure of damage was the loss the plaintiff sustained by not having the shares when demanded; and that they might, if they pleased, measure that loss by the difference between the price at the time of the refusal, and the price at the time when the certificates were given up, and they found accordingly. This direction was held to be correct on a writ of error (*f*). So, in an action on the case against a collector of customs, for refusing to sign a bill of entry for corn, under a claim for duty, and detaining the same, it was decided (also on error) that the measure of damages for the detention, was the loss the plaintiff suffered by a fall in the price of corn while his property was kept from him (*g*). Neither of these cases were in form trover, but the principle upon which damages for the detention of goods should be calculated, is clearly the same.

Property changed by recovery in trover and satisfaction.

Before quitting this subject, it may be as well to remark that a recovery in trover changes the property, and vests it in the defendant. Accordingly it was held to be a good plea to this action, that the plaintiff had previously recovered against a third person for the conversion of the same goods, and that after this recovery, and satisfaction in damages, the defendant in the former action had sold them to the present defendant, which was the conversion now complained of (*h*). There are two points, however, upon which the authorities are at variance. The first is whether the property is changed by the judgment before satisfaction, or only by actual payment of the damages. The latter doctrine is laid down in Jenkins (*i*) where it is said, "A. in trespass against B. for taking a horse recovers damages; by this recovery, and execution done thereon, the property in

(*f*) *Williams* v. *Archer*, 5 C. B. 318.
(*g*) *Barrow* v. *Arnaud*, 8 Q. B. 595.
(*h*) *Cooper* v. *Shepherd*, 3 C. B. 266.
(*i*) 4th Cent. Ca. 88.

the horse is vested in B. *Solutio pretii emptionis loco habetur.*" And so it is stated by Holroyd, J. (*k*), and by Tindal, C. J. (*l*), that by a judgment in trover and satisfaction of damages the property is changed. And this doctrine is cited as law in the notes to W. Saund. by its eminent editors (*m*). On the other hand the contrary rule was maintained in a very recent case, where a plea of judgment without satisfaction was held to be good (*n*). Jervis, C. J., after noticing the cases just cited, said, "But in *Adams* v. *Broughton* (*o*), it is laid down that the judgment, and not the payment of the money recovered, changes the property, and the true rule was laid down by Parke, B., in *King* v. *Hoare* (*p*), viz., 'that that which is uncertain is made certain by the judgment, and then the judgment affords a higher remedy, and the right of action for trover is merged in it.' Precisely the same decision had been arrived at long before, when in trover the defendant pleaded a former recovery against H., who was taken in execution for the damages. It was argued that execution without payment was no satisfaction; but the plea was held good, and Popham, C. J., said, 'If one hath judgment to recover in trespass against one, and damages certain, although he be not satisfied, yet he shall not have a new action for the same trespass. For the same reason, if one have cause of action against two, and obtain judgment against the one, he shall not have remedy against the other'" (*q*). [It became necessary for the Court of Common Pleas to choose between these conflicting authorities in a very recent case in which, in substance, the plaintiff having recovered judgment in trover against one of two wrong-doers, which judgment was unsatisfied, sued the other for keeping the goods, and so continuing the wrong. In a considered judgment the question for decision was stated to be whether judgment in trover without satisfaction changes the property so as to vest it in the defendant from the time of the judgment, or whether

(*k*) 3 B. & C. 206.
(*l*) *Cooper* v. *Shepherd*, 3 C. B. 272.
(*m*) 2 W. Saund. 47 cc. n. *z*. [6th ed. In 2 Notes to Saunders, at p. 134, (*f*), Sir E. V. Williams has introduced the words "it appears not to be material that the recovery should be followed by satisfaction; *Buckland* v. *Johnson*."]
(*n*) *Buckland* v. *Johnson*, 23 L. J. C. P. 204; 15 C. B. 145.
(*o*) 2 Stra. 1078.
(*p*) 13 M. & W. 494.
(*q*) *Brown* v. *Wootton*, Cro. Jac. 73.

such recovery operates as a mere assessment of the value on payment of which the property in the goods vests in the defendant. It was pointed out that *Adams* v. *Broughton* seemed to be unsatisfactorily reported in Strange, and that in *Buckland* v. *Johnson* the point did not really arise; and the opinion of the Court was expressed that good sense and abundant authority showed that mere recovery without satisfaction has not the effect of changing the property. Judgment was accordingly given for the plaintiff (*r*).]

Effect of a judgment for less than the full value of the goods.

The second doubt is as to the effect of a judgment in trover for less than the full value of the goods. It is expressly stated by Holroyd, J., and Littledale, J. (*s*), that an action of trover is no bar unless the full amount has been recovered. And so it was decided in an old case, where the defendant, who was sued in trover for eighty-nine sheep, pleaded a former recovery against other defendants in an action *quare ceperunt et abduxerunt oves*, and damages 2*d.*; there, however, the judgment went on the ground that the verdict had not been for the value of the sheep at all, but only for the damage by taking and driving them; and with this view, Yelverton J., disagreed (*t*). The same point arose incidentally in the case cited above (*u*), though it was not necessary to decide it. The action was for money had and received. Plea, that the money was the proceeds of certain goods of the plaintiff which had been converted, and in respect of which plaintiff had already sued A. in trover, and recovered 100*l.* It appears that defendant and A, had converted the goods by selling them, but that defendant alone had received the proceeds of the sale, which were 150*l.* The plaintiff claimed at all events to recover the difference between his verdict, and the amount for which the goods had sold. It was held he could not, and Jervis, C. J., said, "The fallacy arises from forgetting, that by the judgment in

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[(*r*) *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584; 40 L. J. C. P. 281. This case supports the decision in *King* v. *Hoare*, that judgment against one of two tort feasors is a bar to an action against the other for the same cause of action, although the judgment be unsatisfied; and the judgment was affirmed on appeal on this point, 41 L. J. C. P. 190. An interlocutory judgment signed for want of a plea had previously been held not to pass the property; *Marston* v. *Phillips*, 12 W. R. 8; 9 L. T. N. S. 289.]

(*s*) 3 B. & C. 207.

(*t*) *Lacon* v. *Barnard*, Cro. Car. 35; *Field* v. *Jellicus*, 3 Lev. 124.

(*u*) *Buckland* v. *Johnson*, *ubi supra*.

the action of trover the property in the goods was changed from the time of the conversion (*x*), and that they then became the goods of A.; and that when the defendant received the proceeds of the sale, he received the proceeds of the sale of A.'s goods." Maule, J., said, "In an action of trover, the plaintiff may not always (certainly not always in trespass) recover the full value of his goods. What might be the result if it were shown here, which it is not, that the plaintiff had not recovered the value in the former action, I say nothing; but in the present case, we must take it, that the plaintiff having his election either to sue in trover for a conversion, or in an action for money had and received, elected to sue in trover, and recovered the full value from A." It will be observed that the judgment of the Court is here put on two different grounds, each of which gets rid of the point in question. Jervis, C. J., held, that the proceeds never were money had and received to the plaintiff's use, as the effect of the judgment against A., relating back to the moment of the sale, made them his goods at that instant. If so the defendant was not liable at all. Maule, J., and Cresswell, J., held, that by the election to sue in trover, the plaintiff threw himself upon the verdict of the jury as to what the real value of the property was. They might have given more than it sold for, and they happened to give less. It was no longer in his power to raise the question. Indeed, except in some rare cases, it is hard to see how the question could arise in a shape fit for discussion. It may be presumed that the judge would always direct the jury to give the value of the article, or of the plaintiff's interest in it. The verdict of the jury must be taken to be their finding as to its value. A clear error might be ground for a new trial, but how could a plaintiff, while acquiescing in the verdict, say that it was not what it professed to be?

Detinue.

II. In detinue the judgment is to recover the thing itself and damages for its detention; or if it cannot be returned, then its value (*y*). It [was formerly] in the option of the defendant whether he [would] return the thing, or pay its value (*z*). And there [was] no common law process to compel him to give

(*x*) See 6 M. & G. 640, n.
(*y*) *Peters* v. *Heyward*, Cro. Jac. 682; *Paler* v. *Hardyman*, Yelv. 71.
(*z*) *Per* Frowike, C. J., Keilw. 64, b; *Phillips* v. *Jones*, 15 Q. B. 867.

it up (*a*). [But such a power has been given by statute 17 & 18 Vict. c. 125, s. 78 (*b*).] Where there are several things demanded the jury ought to find the value of each separately (*c*). The rules as to assessing the value of the goods, damages for their detention, and staying proceedings upon their delivery, are just the same as in trover (*d*).

When property cannot be returned.

Where the verdict cannot be for a return of the goods, on account of their destruction or previous re-delivery, it will be absolute, in the former case, for their value and damages; in the latter case, for damages only. In detinue for charters which have been burnt, the plaintiff shall recover the whole value of the land (*e*). And it is a good plea to the further maintenance of the action, that the goods were delivered to and accepted by plaintiff since action, and payment into Court of 1*s*. damages for detention (*f*). And where the action was for scrip certificates which had fallen in value between the time of demand and re-delivery before verdict, the judge left it to the jury to find, as the measure of damages for detention, the diminished price of the scrip (*g*). But the plaintiff must give evidence of the value, and where no such evidence has been given, if the jury give a substantial sum, the Court will, on leave reserved, reduce it to a nominal one (*h*).

On account of the alternative character of a judgment in detinue, the property in the goods detained does not vest in the defendant, till the plaintiff has signified his election to abandon it by issuing execution for the value, instead of resorting to a *distringas ad deliberandum* (*i*).

Damages in trespass are value of goods.

III. In an action for trespass to goods, the damages in general are measured by the value of the goods, or the amount of injury done to them. These have been already sufficiently discussed (*j*), and indeed seldom present any difficulty. In the case of fixtures, however, the mode of valuation may differ

(*a*) *Walker* v. *Needham*, 4 Sco. N. R. 222.
(*b*) See *Chilton* v. *Carrington*, 15 C. B. 730; 24 L. J. C. P. 78.
(*c*) 8 Vin. Abr. 39 Detinue, D. 7; *Pawly* v. *Holly*, 2 W. Bl. 853. As to the effect of their not assessing the value, see post, tit. Writ of Inquiry.
(*d*) See *ante*, pp. 285—304; *Phillips* v. *Hayward*, 3 Dowl. 362.
(*e*) 8 Viner, Abr. 39, Detinue, E.
(*f*) *Crossfield* v. *Such*, 8 Exch. 159.
(*g*) *Williams* v. *Archer*, 5 C. B. 318.
(*h*) *Anderson* v. *Passman*, 7 C. & P. 193.
(*i*) 6 M. & G. 640, n.
(*j*) *Ante*, p. 285, *et seq.*

materially, according to the form in which the action is brought. In trover, as we have seen, the plaintiff can only recover their value as chattels (*k*). But in trespass their actual value as fixtures may be given. S. deposited the lease of his house with plaintiff as security for a loan, and made an assignment of fixtures, undertaking either to mortgage the lease to the plaintiff with power of sale, or to allow him to sell either fixtures, or lease and fixtures on the premises, without a mortgage. S. became a bankrupt, and his assignees in bankruptcy seized the fixtures, and sold them by auction for 36*l.* It appeared that this was a fair price for them when severed, but that they would have sold for 80*l.*, if valued as between incoming and outgoing tenant. It was held that the plaintiff was entitled to the latter amount, as it was not to be presumed that he would not have sold them to the eventual purchaser of the term, which in case of non-payment he was entitled to do (*l*).

Special damage.

Special damage resulting from the immediate loss or injury may also be allowed for, if not of too remote a nature. In an action for injury to the plaintiff's horse by a collision, it was held that he might recover the keep of the horse at the farrier's while it was being cured, the farrier's bill, and the difference between the value of the horse before and after the accident. But he could not recover the hire of another horse which plaintiff had been obliged to have while his own was laid up (*m*).

In one case a curious series of disasters was held to be chargeable upon the defendant. His carriage was driven against the wheel of the plaintiff's chaise; the collision threw a person who was in the chaise upon the dashing-board; the dashing-board fell on the back of the horse; the horse kicked in consequence, and by kicking injured the chaise. It was held that the plaintiff might recover for the whole of the loss so sustained (*n*).

Interpleader.

[An execution creditor has been held not to be liable to a person whose goods have been wrongfully taken in execution

(*k*) *Clarke* v. *Holford*, 2 C. & K. 540, *ante*, p. 292.
(*l*) *Thompson* v. *Pettitt*, 10 Q. B. 103; [*Moore* v. *Drinkwater*, 1 F. & F. 134.]
(*m*) *Hughes* v. *Quentin*, 8 C. & P. 703. See *Barrow* v. *Arnaud*, 8 Q. B. 595; *ante*, p. 304.
(*n*) *Gilbertson* v. *Richardson*, 5 C. B. 502.

for any damage sustained by the latter in consequence of their sale under an interpleader order. The execution creditor is responsible for all damage up to the time of the interpleader order, but what is done under the order is the consequence of the judge's decision upon the interpleader summons and is not the proximate consequence of the seizure (*o*).]

Collision at sea.

When a vessel, having been run down, subsequently becomes unmanageable, and gets upon a bank, and is lost, the presumption of law is, that her eventual loss is attributable to the effects of the collision, and not to the mismanagement of the crew. Her whole value consequently would be the measure of damages (*p*). Where, however, the full value of the vessel is given as compensation by a Court of Admiralty, the plaintiff cannot recover anything in the nature of demurrage for loss of the employment of his vessel, or his own earnings, in consequence of the collision (*q*). And even where the Admiralty Courts allow damages for the detention of a vessel while under repair, the onus of proving the loss so incurred rests upon the plaintiffs. They must prove that the vessel would have earned freight, and that such freight was lost by the collision. When, for example, a fishing voyage is lost, or a vessel would have been beneficially employed, such damages will be given, but not otherwise (*r*).

Demurrage.

I may observe that in the Admiralty Courts, where a collision has occurred, and both parties are equally to blame, the rule is to divide the damages equally between them (*s*).

The cases in which a plaintiff's own negligence may destroy his right to recover for damage done, especially in case of collisions, have been discussed so fully in treating of remoteness of damage, that I need only refer the reader to them (*t*). The liability of shipowners for any loss or damage to any other ship, or to the goods on board of any other ship, by reason of the improper navigation of their own vessel, is limited to [an

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[(*o*) *Walker* v. *Olding*, 1 H. & C. 621 ; 32 L. J. Ex. 142.]

(*p*) *The Mellona*, 3 Rob. Adm. 7. [As to loss caused by mismanagement of the crew, see *The Flying Fish*, *ante*, p. 36.]

(*q*) *The Columbus*, 3 Rob. Adm. 158.

(*r*) *The Clarence*, 3 Rob. Adm. 283.

(*s*) *Vaux* v. *Sheffer*, 8 Moo. P. C. C. 75 ; [*The Milan*, 31 L. J. Adm. 105. The innocent owner of cargo, according to that case, is entitled to recover a moiety of his damage from the owner of each ship.]

(*t*) See *ante*, pp. 36—40.

aggregate amount not exceeding 8*l.* for each ton of the ship's tonnage (*u*).] This act extends to damage caused by collision (*v*).

Costs of former actions.

As to cases in which the costs of former actions may be recovered, the reader is referred to the decisions cited below, and to a former chapter in which they are discussed (*x*).

Damages for the manner of the taking.

There is one distinction between trespass and trover, which materially affects the question of damages. It is, that as the gist of the former action is the wrongful taking, while that of the latter is the wrongful conversion, damages may be recovered in trespass on account of a stage of proceedings prior to that which can be noticed in trover. The manner in which the property was seized may be the source of substantial damages, in addition to any which could be given in respect of their detention. Accordingly where the defendant wrongfully seized goods, and placed a man in possession of them for several days, but allowed the plaintiff to make free use of them, it was decided that the owner might recover substantial damages (*y*). In such a case, in trover, only nominal damages could have been given for the conversion. And so in an action for seizing goods under an unfounded claim for a debt, damages may be given beyond the value of the goods, not only for the breaking and entering, but also on account of the false pretence of a legal claim, and the annoyance and disturbance to the plaintiff in carrying on his business, and the belief caused of his insolvency, in consequence of which his lodgers left him (*z*). Where, however, the action is against two jointly, nothing can be given in evidence as special damage which is not the joint act of both. The true criterion of damage is the whole injury which the plaintiff has sustained from the joint act. Therefore the malignant motive of one party cannot be made a ground of

Actions against several.

[(*u*) 25 & 26 Vict. c. 63, s. 54, *ante*, p. 224. By the ancient law of the sea, there is no limitation to the liability of a wrong-doer; *The Wild Ranger*, 32 L. J. Adm. 49.]

(*v*) Abb. Ship. 240, 8th ed., [616, 11th ed.]; 2 B. & A. 15. See *ante*, p. 224. [And it has operation on the high seas, and applies both to British and foreign ships; *The Amalia*, 32 L. J. Adm. 191, *ante*, p. 225.]

(*x*) *Holloway* v. *Turner*, 6 Q. B. 928; *Tindall* v. *Bell*, 11 M. & W. 228; *Loton* v. *Devereux*, 3 B. & Ad. 343.

(*y*) *Baylies* v. *Fisher*, 7 Bingh. 153; [*Mudun Doss* v. *Gokul Doss*, 14 W. R. 590; 14 L. T. N. S. 646, P. C.]

(*z*) *Brewer* v. *Dew*, 11 M. & W. 625.

aggravation of damages against the other party, who was altogether free from any improper motive. In such a case the plaintiff ought to select the party against whom he means to get aggravated damage (*a*). Where, however, the same motive actuated both, I apprehend there could be no reason against offering evidence of it (*b*).

Actions by several.

On the same principle, in an action by several, no evidence can be received, and no damages allowed in respect of any injury to one which was not also an injury to the others (*c*).

Customs Acts.

As to actions for seizures under the Customs Acts, see *ante*, p. 297.

Mitigation of damages.

In mitigation of damages, the defendant may of course show anything which tends to diminish the value of the thing affected, or the amount of loss incurred, or may negative the malicious motive ascribed to him.

Accordingly, in trespass for destroying a picture, which turned out to be a scandalous libel upon the defendant and his sister, and which was publicly exhibited, Lord Ellenborough told the jury that if it was a libel upon the persons introduced into it, the law could not consider it valuable as a picture, and that in assessing damages they must not consider it as a work of art, but must award the plaintiff only the value of the canvas and paint, which formed its component parts (*d*). And so the defendant may show that the plaintiff had not an interest in the goods to their full value, and that the residue of the interest was in himself. In such a case the plaintiff can only recover to the extent of his own interest (*e*). But this would be no defence, even in mitigation of damages, when the residue of interest was not in the defendant, but some third person (*f*).

Re-payment of produce of goods taken.

It has been decided that in trespass for taking goods, the defendant cannot, even in mitigation of damages, offer evidence to show a repayment by him, after action brought, of

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(*a*) *Clark* v. *Newsam*, 1 Exch. 131, 139. [See *post*, p. 435.]

(*b*) As to the admissibility of evidence of motive in actions of tort, see *ante*, p. 24, *et seq.*

(*c*) *Barratt* v. *Collins*, 10 Moo. 446.

(*d*) *Du Bost* v. *Beresford*, 2 Camp. 511.

(*e*) *Brierly* v. *Kendall*, 17 Q. B. 937; [*Toms* v. *Wilson*, 32 L. J. Q. B. 332, in Ex. Ch.;] *ante*, p. 298.

(*f*) *Heydon's Case*, 13 Rep. 69; Stor. Bailm. s. 352.

money produced by the sale of the goods. Lord Denman said, "The rights of parties at trial are the same as they were at the commencement of the suit, or if they are changed, a plea puis darrein continuance ought to place the new facts on the record. It is important to uphold the principle, that a party is entitled to recover by way of damage all that at the commencement of the suit he has lost through the wrongful act of the defendant" (*g*). This decision is certainly opposed to natural justice, and it seems equally opposed to the analogy of other actions. In trover, as we have seen, a re-delivery of the goods, even after action brought, will authorise the jury to give only nominal damages, unless actual loss has been caused by the detention or otherwise (*h*). So in detinue, where the goods have been returned after the commencement of the suit, the judgment is only for the damages caused by the detention (*i*). In trespass, no doubt, an additional element enters into the verdict. It ought to comprise damages for the manner of the taking, for the value of the thing taken, and for the loss incurred by its being taken. But when the second item has been already paid for, why should it be paid for again in trespass, any more than in trover or detinue? It is difficult to see how any plea puis darrein continuance could have been framed, which would not have been bad on general demurrer, unless it had alleged that the money was paid and accepted in full satisfaction of all the causes of action, which it obviously was not. Anything short of this would have been merely a plea to the damages, and have left the taking unanswered (*k*). No doubt the defendant, instead of paying the money to the plaintiff, might have paid it into Court. But such a course would clearly have been less beneficial to the plaintiff, since it would have forced him to stop his action, or continue it at the risk of losing his costs (*l*); it is hard then to see why it should be so much more beneficial to the defendant. Nor is this like an attempt to surprise the plaintiff by setting up a new defence, such as title in another,

(*g*) *Rundle* v. *Little*, 6 Q. B. 174.
(*h*) *Moon* v. *Raphael*, 2 Bingh. N. C. 315.
(*i*) *Williams* v. *Archer*, 5 C. B. 318.
(*k*) 1 W. Saund. 28, *a*, n. 3. [1 Wms. Notes to Saund. 23, n. (1).]
(*l*) *Rumbelow* v. *Whalley*, 16 Q. B. 397.

because if true at all it must be perfectly known to him. Nor, finally, does it come within the rule which requires payment after action to be pleaded, because it would have been no defence if it had been pleaded (*m*).

In the same case a question was raised, whether an attorney, sued in trespass for seizing goods, might give in evidence a judgment under which he had acted in issuing a fi. fa. No decision seems to have been given upon this point. On principle it would seem to be admissible in mitigation of damages, as showing the character of the act, and the absence of all malicious motive.

Evidence of collateral matter is not admissible.

Matter of a merely collateral nature cannot be given in reduction of damages. For instance, where the action was for injury caused by a collision at sea, the defendant was not allowed to deduct from the amount of loss proved, any money paid to the plaintiff by his insurers in respect of the same damage. This would be to make the wrong-doer pay nothing, and take all the benefit of the insurance without the burthen of the premium (*n*). On the same principle, in trespass for taking away goods sold by defendant to plaintiff, and not paid for according to contract, the plaintiff is entitled to their full value. The jury cannot take into consideration the debt due in respect of them from the plaintiff to the defendant, because the retaking by the latter would be no answer to an action by him for their price (*o*).

Actions against sheriff.

This is the most proper place for noticing actions against the sheriff by the debtor, or supposed debtor, for an unlawful execution. In such cases the sheriff appears as a wrong-doer, and damages against him are regulated on much the same principles as against other persons. The rule was discussed lately in the Court of Queen's Bench under the following circumstances. The action was trespass against the sheriff and his bailiff for breaking the plaintiff's house, and seizing his goods; it appeared that a former execution for the same debt 270*l.* had been put in, and the debt had been paid to a person at the bailiff's office. He never paid it over, and the execu-

(*m*) See, too, *per* Lord Abinger, C. B., 11 M. & W. 744.
(*n*) *Yates* v. *Whyte*, 4 Bingh. N. C. 272.
(*o*) *Gillard* v. *Brittan* 8 M. & W. 575; [*Page* v. *Cowasjee*, L. R. 1 P. C. App. 127. See *ante*, p. 300.]

tion creditor never received it. Upon this account execution was put in by the same sheriff, which was the ground of action. The goods were not sold; but a man remained in possession several days. The jury gave a verdict for 400*l.* It was held that these damages were not excessive against the sheriff; per Cur. "If the second execution had been put in merely by mistake, or with a view *bonâ fide* to try any question which might fairly have been tried between the sheriff and the plaintiff, we should have thought the damages excessive as against the sheriff, as they greatly exceeded the pecuniary loss sustained. Sheriffs acting *bonâ fide* are entitled to and will always have the protection of the Court. The jury appear to have thought that this was a case in which the process of the Court had been abused, and a gross outrage was committed under the forms of law. We cannot say that they were wrong in coming to this conclusion, and if they were right, we should not be justified in interfering in behalf of the sheriff with the amount of compensation which they have awarded in the exercise of their constitutional functions" (*p*).

Damages when goods have been seized by breaking open outer door.

A question has arisen several times as to the amount of damages, where the sheriff has taken goods under a regular fi. fa., but has been guilty of such an irregularity in executing it as makes him a trespasser *ab initio*. It is laid down in *Semayne's* case (*q*), that the sheriff cannot break the defendant's house by force of a fi. fa., but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good. If this be so, damages against him ought only to be for the breaking, and not for the seizure. On the other hand, there seems to be an almost insuperable difficulty in the way of framing any plea which shall not leave the taking without justification, and, unless it can be justified, nothing short of entire damages can, it seems, be given. It is settled that the door being open is a condition precedent to

(*p*) *Gregory* v. *Cotterell*, 1 E. & B. 360; 22 L. J. Q. B. 217. [It was decided in this case in the Ex. Ch. that the sheriff is responsible not only for the wrongful acts of his officers, but for those of persons employed by them, if done by colour of the warrant; 5 E. & B. 571; 25 L. J. Q. B. 33. The high bailiff of a county court is in a similar position; *Burton* v. *Le Gros*, 34 L. J. Q. B. 91.]

(*q*) 5 Rep. 93, a; 1 Sm. L. C. 92, 6th ed.

executing the writ in the dwelling-house, and that the averment is material. Therefore when in trespass for breaking the plaintiff's house, and arresting him therein, the defendant pleaded, except as to the breaking, an arrest under a ca. sa., the door being open, and this averment was traversed with success; it was held that damages might be given not only for the breaking and entering, but also for the arrest (*r*). This, however, was a case of personal arrest, and in a later instance Parke, B., asked, "whether there was any authority for saying that the same doctrine applied to an execution against goods?" (*s*). There is an exactly similar case; the action was for breaking and entering plaintiff's house, seizing his goods, and compelling him to pay a sum of money to withdraw from possession. The defendant justified under a writ of fi. fa., the outer door being at the time open. The jury found that it was shut, and gave 720*l.*, observing that that sum was meant to include 220*l.* paid by the plaintiff, under protest, to induce the defendant to withdraw the execution. A motion was made to reduce the damages, on the ground that the execution was valid, though the entry was a trespass, and therefore the amount of the levy ought not to have been given. The Court, in giving judgment, after observing that the only plea of justification under the writ of fi. fa. was one which alleged that the defendant entered for the purpose of making a levy, the outer door being open, and that this allegation was found against them, as well as the plea of not guilty, proceeded to say, "The defendants therefore could not avail themselves of the writ of fi. fa. under the plea of the general issue, and were, upon the state of the record, without defence in regard to the amount exacted to induce them to withdraw; the jury were warranted in including the amount so exacted in damages. The state of the record before-mentioned renders it unnecessary to consider how far, and to what extent, a levy under a writ of fi. fa. can be justified, where properly pleaded, when the possession of the goods has been illegally obtained" (*t*). When the question next arises we may expect some phenomenon of special pleading to meet the possibility

(*r*) *Kerbey* v. *Denby*, 1 M. & W. 336.
(*s*) *Percival* v. *Stamp*, 9 Exch. 167, 170; 23 L. J. Ex. 25.
(*t*) *Brunswick* v. *Slowman*, 8 C. B. 317, 330.

so cautiously hinted at. Probably the real importance of the doctrine above stated will be felt when the action is not against the sheriff or his bailiffs, but against the execution creditor, for the proceeds of the sale. Should he be successful in separating himself from any connection with the unlawful entry, he may be held entitled to retain the goods, on the ground that the execution was valid, and that he cannot be put in a worse position on account of improper conduct which he did not sanction, and which was not the act of his agent, but of a public officer obeying the mandate of a Court of Justice (*u*).

Breaking outer door of an out-house.

I may observe that the outer door of an out-house may be broken open for the purpose of executing a fi. fa. (*x*), but not in making a distress (*y*). The cases were reconciled by Lord Campbell, C. J., on the ground that a distinction may reasonably be made between the powers of an officer acting in execution of legal process, and the powers of a private indidual, who takes the law into his own hands, and for his own purposes (*z*).

Seizing goods out of jurisdiction.

Where a fi. fa. has been executed in a place where the Court had no authority, as for instance, out of the jurisdiction of the Court, the measure of damages is the whole value of the goods seized, and not the amount of injury actually sustained. To admit the latter mode of estimating damages would be, in effect, allowing the illegal proceedings to stand good (*a*).

Payment of money to recover.

When, after a wrongful seizure by the sheriff, the goods are taken from him by another wrong-doer, from whom the right owner can only obtain them by payment, he may, in an action against the sheriff, recover as special damage the money necessarily so paid (*b*). And on the same principle the sheriff

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(*u*) See 7 H. IV. 35, Com. Dig. Trespass, C. 1, 4 Inst. 317; *Robinson* v. *Vaughton*, 8 C. & P. 255; *Wilson* v. *Tumman*, 6 M. & G. 236; *Lyons* v. *Martin*, 8 A. & E. 512; *Freeman* v. *Rosher*, 13 Q. B. 780; [*Smith* v. *Holbrooke*, 9 Ir. L. R. 155.]

(*x*) *Penton* v. *Browne*, 1 Sid. 186.

(*y*) 9 Vin. Abr. 128, Distress (E. 2), pl. 6; *Brown* v. *Glenn*, 16 Q. B. 254.

(*z*) 16 Q. B. 257. [Both in the case of distress and execution, a bailiff may break open the door to retake possession if there has been no abandonment; *Bannister* v. *Hyde*, 3 E. & E. 627; 29 L. J. Q B. 141.]

(*a*) *Sowell* v. *Champion*, 6 A. & E. 407.

(*b*) *Keene* v. *Dilke*, 4 Exch. 388.

is liable to all the costs of an illegal arrest, and not the original plaintiff, unless he was privy to it (*c*).

Damages where plaintiff must have sold.

We have before observed (*d*) that in trover by a bankrupt's assignees, who would themselves have had to sell, the jury seldom give greater damages than the amount at which the goods actually sold (*e*); and even may allow the sheriff's expenses, if there were no circumstances making a sale by him more unfavourable to them than if it had not taken place (*f*). But where the plaintiff is himself the owner of the goods, and sues in trespass, the amount of damages is entirely for the jury, and they are not limited to the amount for which the goods sold, though he had himself intended to sell them, and the sale was conducted by the auctioneer whom he had commissioned for that purpose (*g*).

Payments made by sheriff.

When in an action against the sheriff for seizing goods, evidence was offered in reduction of damages, that the sheriff had made certain payments on account of rent and executions, which it was admitted he was bound to satisfy, the Court considered it doubtful whether such evidence was in general admissible. In the particular instance, however, it was allowed, as the plaintiffs had in their own notice of demand expressly excepted the sums in question (*h*).

Cases of doubt as to right of property.

When there is a doubt respecting the property of goods which the sheriff is directed to seize, he may summon a jury, in the nature of an inquest on office, to satisfy himself whether the goods belong to the debtor or not. Their verdict does not bind the rights of the parties, but it will go in mitigation of damages, if they find that the goods are those of the debtor, and it should happen that they are not (*i*). In general, however, the modern remedy by interpleader, under 1 & 2 W. IV. c. 58, s. 6, will be found more effectual.

Damages in replevin.

IV. The action of replevin is an anomalous one, in this respect, that both plaintiff and defendant are actors in the suit. In fact, it consists of two cross actions; in which one party

(*c*) Anon. 1 Chit. 580.
(*d*) *Ante*, p. 289.
(*e*) *Whitehouse* v. *Atkinson*, 3 C. & P. 344.
(*f*) *Clark* v. *Nicholson*, 6 C. & P. 712; 1 C. M. & R. 724, S. C.
(*g*) *Lockley* v. *Pye*, 8 M. & W. 133.
(*h*) *Goldsmid* v. *Raphael*, 3 Sco. 385.
(*i*) Dalton, Sheriff, 146, Gilb. Execution, 21, 4 T. R. 633; *Roberts* v. *Thomas*, 6 T. R. 88.

claims damages for having his goods seized, while the other party claims satisfaction for some demand out of which the seizure arose. One result of this peculiarity is, that either party may obtain damages (*k*).

Should a verdict be found for the plaintiff, the jury assess the damages as in an ordinary action of trespass. Unless special damage is laid, they are generally only costs of the replevin bond, and in practice [were, before 19 & 20 Vict., c. 108,] always assessed at 2*l.* 2*s.* in London, Middlesex, York, and some other places; 2*l.* 10*s.* elsewhere (*l*). [They now depend on the amount distrained for (*m*).] These are all he is in fairness entitled to, as he has already been given back possession of the goods distrained.

Should the defendant be successful, the case requires more consideration, as several courses are open to him at Common Law, and by Statute.

At common law.

No damages are recoverable at the Common Law by the defendant in an action of replevin, or second deliverance. Should there be a verdict for the defendant, or the plaintiff be nonsuited, the judgment at Common Law would merely be for a return of the goods (*n*).

By statutes of Henry VIII.

By the combined effect of two statutes, 7 Hen. VIII. c. 4, s. 3, and 21 Hen. VIII. c. 19, s. 3; every avowant, and every person who makes avowry or cognisance, or justifies as bailiff in any replegiare or second deliverance for any rent, custom, or service, or for damage feasant upon any distress taken in any land or tenement; if the avowry, &c., be found for him, or the plaintiff be nonsuited, or otherwise barred, shall recover his damages and costs that he has sustained, as the plaintiff should have done if he had recovered.

An executor who avows or makes cognisance under the provisions of 32 Hen. VIII. c. 37, may recover damages under the

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[(*k*) Money can now be paid into court by a plaintiff in replevin, in answer to an avowry; C. L. P. Act, 1860, 23 & 24 Vict. c. 126, s. 23.]

(*l*) Chit. Prac. 1030, 9th ed., Archb. Prac. (1853) 335. It is doubtful whether special damages arising from an injury to the goods by defendant or otherwise, can be recovered; *Connor* v. *Bentley*, 1 Jebb & Sy. Ir. Rep. 246. [See *Ognell's case*, 3 Leon. 213; *Atkinson* v. *Nesbitt*, 9 Ir. L. R. 271, and cases cited there.]

[(*m*) 19 & 20 Vict. c. 108, Schedule C.; Chitty's Arch. Pr. 1092, 12th ed. By s. 71, a deposit may be made instead of security being given. This statute is extended to all cases of replevin by 23 & 24 Vict. c. 126, s. 22.]

(*n*) Chit. Forms, 584, 7th ed.; Tidd, Forms, 607.

above clauses (*o*); but they do not apply where the defendant avows, &c., for any amercement by a Court Leet or Court Baron (*p*); nor where the defendant pleads property in the thing distrained (*q*).

By statute Car. II.

By 17 Car. II. c. 7, s. 2, where in replevin for arrears of rent, the plaintiff shall be nonsuit before issue joined, the defendant is to make a suggestion in the nature of an avowry or cognisance, upon which a writ of inquiry is to issue; and a similar writ is to be awarded where the defendant has judgment on demurrer, s. 3; and the jury are to inquire the value of the goods, or cattle distrained, and the rent in arrear. Upon the return of the writ, defendant is to have judgment to recover the arrears of rent, if the goods, &c., amount to that sum; and if not, then the value of such goods, &c., with his full costs of suit. Where the plaintiff is nonsuit after issue joined, or if the verdict shall be against the plaintiff, then the jury who are empannelled must make the same inquiry. And if they omit to do so, no other jury can (*r*). But the defendant is under no obligation to proceed by this statute; therefore, in such a case, the defendant may enter up judgment de retorno habendo at Common Law, even after error brought (*s*); and where the jury found the amount of damages and costs, but not the value of the distress or the rent in arrear, it was held that it might be taken to be a good judgment under stat. 21 Hen. VIII. c. 19, s. 3 (*t*).

Replevin for poor rates.

Stat. 43 Eliz. c. 2, s. 19, enacts, that where goods seized under a distress for poor rates are replevied, and the issue is found for the defendant, or the plaintiff is nonsuit after appearance, the defendant shall recover treble damages. Treble damages, under this act, are three times the amount of the charges incurred in respect of the distress; but not three times the amount of the sum distrained for also. Therefore, where the plaintiff had failed to proceed with his writ, he was held liable to the sum due, and three times the broker's charges (*u*).

(*o*) *Farnell* v. *Keightley*, 2 Roll. Rep. 457.
(*p*) *Porter* v. *Gray*; Cro. Eliz. 301; *Samuel* v. *Hoder*, Cro. Jac. 520.
(*q*) Hard. 153.
(*r*) *Sheape* v. *Culpeper*, 1 Lev. 255; *Herbert* v. *Walters*, 1 Ld. Raym. 59; *Kynaston* v. *Mayor of Shrewsbury*, 2 Str. 1052.
(*s*) *Rees* v. *Morgan*, 3 T. R. 349.
(*t*) *Gamon* v. *Jones*, 4 T. R. 509.
(*u*) *Newman* v. *Bernard*, 10 Bingh. 274.

V. Illegal distress.

The damages in suits of this nature depend greatly upon the form in which the action may be brought. Where the defendant can be treated as a trespasser *ab initio*, so as to make his possession of the goods wholly wrongful, their entire value will be recoverable. When it is necessary to sue for consequential damage, the plaintiff can only obtain damages for the special injury he has suffered, which may be very slight, where he was really in fault, and liable to a seizure of his goods.

Form of action where an irregularity has been committed in distraining for rent.

The action must always be for consequential damages where any irregularity has been committed in distraining for rent. This is enacted by 11 Geo. II. c. 19, s. 19, which, after reciting that some irregularity is occasionally committed, for which the party distraining is deemed a trespasser *ab initio*, and the plaintiff has been entitled to recover the full value of the rent for which the distress was taken, provides, that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not therefore be deemed unlawful, nor the persons making it trespassers *ab initio;* but the parties aggrieved shall recover full satisfaction for the special damage they shall have sustained, and no more, in an action of trespass, or on the case, at the election of the plaintiff. And no tenant shall recover in an action [for any such unlawful act or irregularity], if tender of amends have been made before action brought (*x*).

[It was for some time assumed that under this section a plaintiff might always recover nominal damages for an irregularity, but it is now settled that the plaintiff can only recover where actual damage is proved (*y*).]

The following are the principal species of irregularity for which actions may be brought:

Action for an excessive distress.

Actions for excessive distress arise out of the statute 52 Hen. III. c. 4 (*z*), which provides that distresses shall be reasonable and not too great. And they that take great and

(*x*) *Ibid.*, s. 20.

[(*y*) *Rodgers* v. *Parker*, 18 C. B 112; 25 L. J. C. P. 220; *Lucas* v. *Tarleton*, 3 H. & N. 116; 27 L. J. Ex. 246.]

(*z*) Probably the action would lie even independently, for Lord Coke says of this statute, it agreeth with the reason of the common law. 2 Inst. 107, 1 M. & W. 447.

unreasonable distresses shall be grievously amerced for the excess of such distresses. And such actions must always be in case (*a*). Damages for an excessive distress, where the goods have been sold, will depend upon the loss and inconvenience the plaintiff has been put to by having an unnecessary amount of his goods taken from him. If the amount for which they sold, beyond the claim against him, has not been returned to him, of course it will form part of the damages (*b*). In order to estimate whether the amount taken was excessive or not, their value must be calculated according to the sum which they would fetch at a broker's sale, not at the price which could be obtained for them from an incoming tenant in the same line of business as the plaintiff (*c*), because the former is their value for the purpose of satisfying the defendant's demand. Where, however, the declaration makes no mention of a sale, either as special damage, or by way of substantive complaint, damages can only be recovered in respect of the detention up to the time they were sold, and not in respect of the sale itself (*d*). [In a recent case, in which there had been no sale and no actual damage was shown to have been sustained, the Court of Exchequer were of opinion that in every case of excessive distress there must be some loss or inconvenience for which a jury ought to be told that they must find some damages either nominal or substantial (*e*).]

On the other hand, when the distress is so excessive on the face of it, that some of the things must be supposed to have been taken without shadow of claim, as where 6 oz. of gold and 100 oz. of silver were taken for a debt of 6*s*. 8*d*., trespass will lie (*f*).

But it is, in Ireland. see C.C.C. sul : Dublin

No action at all is maintainable for distraining for more rent than is due, provided the distress is not excessive as to that which is due; and an assertion that the distress was

(*a*) *Woodcroft* v. *Thompson*, 3 Lev. 48; *Lynne* v. *Moody*, 2 Stra. 851. [*Hughes* v. *Browne*, 7 Ir. L. 492.]

(*b*) See *per* Parke, B., 1 M. & W. 448.

(*c*) *Wells* v. *Moody*, 7 C. & P. 59. [The price realised at the sale is not a conclusive test of the value; *Smith* v. *Ashforth*, 29 L. J. Ex. 259. There substantial damages were recovered, though the sale did not realise the rent due.]

(*d*) *Thompson* v. *Wood*, 4 Q. B. 493.

[(*e*) *Chandler* v. *Doulton*, 3 H. & C. 553; 34 L. J. Ex. 89.]

(*f*) *Hutchins* v. *Chambers*, 1 Burr. 579; *Crowther* v. *Ramsbottom*, 7 T. R. 658.

made maliciously, will not render a count to that effect good (*g*).

Irregularity in distraining corn or hay, or growing crops.

By s. 3 of 2 W. & M. sess. 1, c. 5, s. 3, loose corn or hay may be distrained for rent, but it cannot be removed from the land till it is either replevied, or sold in default of replevying.

By 11 Geo. II. c. 19, s. 8, growing crops may be seized for arrears, and cut, cured, and laid up when ripe in barns, &c., upon the premises, and appraised or sold in the same manner as other goods or chattels; and the appraisement to be taken when cut, gathered, cured, and made, and not before.

Tender of rent in arrear, and cost and charges of making distress, and which shall have been occasioned thereby, at any time before corn, &c., is ripe, cut, and cured, to put an end to distress (*h*).

Where there has been an excessive distress by taking corn or hay loose (under 2 W. & M. sess. 1, c. 5, s. 3), or growing crops (under 11 Geo. II. c. 19), the measure of damage is not the full value of the crops, beyond the amount which ought to have been taken, because the tenant is not ultimately deprived of them. It is simply such a sum as is a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession; and some compensation for the loss of absolute ownership, and power of disposition for the same time; or if the tenant has replevied, then a compensation for the additional expense and inconvenience of replevying to a larger amount. If moveables have been distrained on along with growing crops, the probable value of the latter cannot be taken as a present satisfaction of the rent to that amount, so as to make the landlord a wrongdoer, by taking and selling all, or, as the case may be, the excess of moveable chattels, and liable for their value. He has a right to apply those which are immediately productive in satisfaction of the rent *pro tanto*, and hold a reasonable

(*g*) *Tancred* v. *Leyland*, 16 Q. B. 669; [*Glynn* v. *Thomas*, 11 Ex. 870; 25 L. J. Ex. 125;] *Stevenson* v. *Newnham*, 13 C. B. 285; 22 L. J. C. P. 110; overruling *Taylor* v. *Henniker*, 12 A. & E. 488. [It is settled law that a distrainor may *justify* for any cause which existed at the time, although he set up a different one; *Phillips* v. *Whitsed*, 2 E. & E. 804; 29 L. J. Q. B. 164.]

(*h*) *Ibid.*, s. 9.

part of the present unproductive fund as a security for the balance (*i*).

In one case arising out of the latter statute, it was decided that a sale of growing crops was wholly void unless the provisions of the act were complied with; and that no action could be maintained for consequential loss arising from a premature sale, since it was such a nullity that no legal damage could be sustained from it (*k*). This decision, however, is opposed to a later one where a similar question arose. A landlord seized growing crops under a distress for rent, and sold them before they were cut, contrary to the statute. They were afterwards cut and carried away by the purchaser. It appeared that they sold for the full amount they would have fetched, if sold at the proper time; and that rent to an amount greater than their value was due. Nominal damages only were given. Lord Lyndhurst, C. B., said, "By the terms of the Act, the party injured by an unlawful act, committed after a lawful distress, is only to recover to the amount of the damage he has actually sustained." Bayley, B., asked "What damage is the plaintiff entitled to? Why, the difference between the amount for which the crops would have sold, if the sale had been regular, and that which they actually sold for" (*l*). [The form of the rule in this case merely rendered it necessary for the Court to decide that the plaintiff was not entitled to more than nominal damages, but the grounds of decision would have justified a verdict for the defendant; and it has since been decided, in a similar case, that where the plaintiff fails to prove special damage he is not entitled to nominal damages, but the defendant is entitled to the verdict (*m*).]

Selling without appraisement.

At Common Law the distrainor could not sell the property seized, but by 2 W. & M. sess. 1, c. 5, s. 2, where goods are distrained for rent, and the tenant or owner of the goods shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking), replevy the same, then after such distress and notice and expiration of five days,

(*i*) *Per* Parke, B., *Piggott* v. *Birtels*, 1 M. & W. 441, 451.
(*k*) *Owen* v. *Legh*, 3 B. & A. 470.
(*l*) *Proudlove* v. *Twemlow*, 1 C. & M. 326.
[(*m*) *Rodgers* v. *Parker*, 18 C. B. 112; 25 L. J. C. P. 220.]

the distrainor may cause the goods to be appraised by two sworn appraisers, and after such appraisement may sell for the best price that can be gotten at the time (*n*), leaving the overplus, if any, in the hands of the sheriff, &c. for the owner's use. In an action on the case for selling goods distrained, without appraisement, the measure of damages is the value of the goods *minus* the rent due (*o*).

Actions on the case also lie upon the equity of the above statute, for not removing the distress in a reasonable time (*p*); though the plaintiff may, if he choose, sue for the continuing upon the premises after five days, as an independent trespass (*q*). And similarly for not giving notice, and not selling at the best price (*r*). [And apparently for locking up the whole of the premises and excluding the tenant (*s*).] The damages in all such instances will depend upon the actual loss the plaintiff can prove. In an action for not selling a distress at the best price, he was allowed to show that the goods were left standing in the rain, and that they were improperly lotted (*t*). Want of notice does not render a distress invalid (*u*).

Driving cattle into another county.

By 52 H. III. c. 4, and 1 & 2 Ph. & M. c. 12, s. 1, it is enacted that no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe where such distress is taken, except it be to a pound overt within the same shire, not above three miles distant from the place where the said distress is taken; and that no cattle or other goods distrained or taken by way of distress, for any matter or cause at one time, shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of the said distress; penalty for every such offence 100*l.*, and treble damages.

[(*n*) The statute contemplates a sale. The landlord's taking the goods at the condemned price does not divest the tenant's property in them; *King* v. *England*, 4 B. & S. 782; 33 L. J. Q. B. 145.]

(*o*) *Biggins* v. *Goode*, 2 Cr. & J. 364; *Knight* v. *Egerton*, 7 Exch. 407.

(*p*) Com. Dig. Distress, I.

(*q*) *Griffin* v. *Scott*, 2 Stra. 717.

(*r*) Com. Dig. Distress, D. 7; 2 Chitt. Pl. 537.

[(*s*) *Smith* v. *Ashforth*, 29 L. J. Ex. 259.]

(*t*) *Poynter* v. *Buckley*, 5 C. & P. 512; and see *Ridgway* v. *Stafford*, 6 Exch. 404; *Roden* v. *Eyton*, 6 C. B. 427.

(*u*) *Trent* v. *Hunt*, 9 Exch. 14.

In all these cases where the first taking of the distress is lawful, a subsequent disobedience to the statute does not make it void, so as to enable the other party to sue in trespass; therefore where the action is for driving into another county (*x*), it must be framed in case upon the statute. The damages would probably be such as the Act suggests, viz., the additional trouble and expense of replevying. This Act, it will be observed, equally applies to cases of damage feasant.

Cases to which 11 Geo. II. c. 19, s. 19, does not apply.

It will be readily seen that there are many cases to which the above section (*y*), in favour of distresses where there has been a subsequent irregularity, does not apply. It is expressly confined to distresses for rent, and therefore the law as to damage feasant is left where it was before. Nor does it apply where the distress is void *ab initio;* as, for instance, where no rent was due at all (*z*); or where the distress was effected by breaking open an outer door (*a*); [or by opening a closed window (*b*), or after sunset and before sunrise (*c*);] or where the goods taken were not distrainable at all. In all these cases trespass or trover may be maintained, and the actual value of the things recovered (*d*). And where a distress is made by virtue of 2 W. & M. sess. 1, c. 5, for rent pretended to be due, and none is really in arrear, the owner of the goods distrained may recover double their value and full costs (*e*), and the jury ought to be directed to give this amount (*f*). Nor does it apply to any independent act, irrespective of the distress; as, for instance, where a landlord, after making a distress, turned the tenant out of possession (*g*).

Effect of a tender.

A distress will also be void *ab initio*, when made after tender. But tender after distress, and before impounding, makes the detainer, and not the original taking, wrongful;

(*x*) *Gimbart* v. *Pelah*, 2 Str. 1272.
(*y*) 11 Geo. II. c. 19, s. 19.
(*z*) *Ireland* v. *Johnson*, 1 Bingh. N. C. 162.
(*a*) *Brown* v. *Glenn*, 16 Q. B. 254.
[(*b*) *Nash* v. *Lucas*, L. R. 2 Q. B. 590.]
[(*c*) *Tutton* v. *Darke*, 5 H. & N. 647; 29 L. J. Ex. 271.]
[(*d*) *Keen* v. *Priest*, 4 H. & N. 236; 28 L. J. Ex. 157; *Attack* v. *Bramwell*, 3 B. &. S. 520; 32 L. J. Q. B. 146; *Swire* v. *Leach*, 18 C. B. N. S. 479; 34 L. J. C. P. 150; *Nargett* v. *Nias*, 1 E. & E. 439; 28 L. J. Q. B. 143.]
(*e*) S. 5.
(*f*) *Masters* v. *Farris*, 1 C. B. 715.
(*g*) *Etherton* v. *Popplewell*, 1 East, 139.

and [at Common Law] tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because the cause is put to the trial of the law to be there determined (*h*). [But an action on the case, upon the equity of the statute 2 W. & M. sess. 1, c. 5, s. 2, will lie where the landlord has proceeded after tender, when the tender took place after the impounding but within the five days and before sale (*i*).

The tender must be made to some person authorised to receive the money, and a man merely left in possession has no implied authority at law to do so (*k*). Before the distress is actually made a tender of rent without expenses is sufficient, though the warrant have been delivered to the broker for execution (*l*)].

What makes a party a trespasser ab initio.

To make a party trespasser *ab initio*, there must be some act done, as seizing after tender, or working or killing a distress taken damage feasant: mere non-feasance, as refusing to return a distress upon tender made after seizure, will not make the original taking, but only the subsequent detainer, wrongful (*m*). So where customs'-officers detained dutiable goods at the custom-house, under an unfounded belief that they were prohibited and liable to forfeiture, this was held not to be a trespass, as they had come into their possession originally without any trespass or seizure on their part (*n*).

Trespass ab initio as to part of the distress.

Even where a party is, or becomes, a trespasser *ab initio*, as to part of the thing distrained on, this does not make the distress void as to the rest. Accordingly where several barrels of

(*h*) *Six Carpenters' case*, 8 Rep. 147, a; Gilb. Dist. 50, 67. [See as to tender after distress and before impounding; *Loring* v. *Warburton*, E. B. & E. 507; 28 L. J. Q. B. 31; as to tender after impounding, where the distress was taken, damage feasant; *Sheriff* v. *James*, 1 Bingh. 341; *Anscomb* v. *Shore*, 1 Camp. 285; 1 Taunt. 261, S. C.]

[(*i*) *Johnson* v. *Upham*, 2 E. & E. 250; 28 L. J. Q. B. 252; dissenting from *Ellis* v. *Taylor*, 8 M. & W. 415; and *Ladd* v. *Thomas*, 12 A. & E. 117.]

[(*k*) *Boulton* v. *Reynolds*, 2 E. & E. 369; 29 L. J. Q. B. 11.]

[(*l*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L. J. Ex. 224. In this case the plaintiffs recovered against the landlord's agents, who had signed the distress warrant.]

(*m*) *Six Carpenters' case*, 8 Rep. 146, a. [If the distrainor unlawfully works the distress, the owner may retake it; *Smith* v. *Wright*, 6 H. & N. 821; 30 L. J. Ex. 313. The distrainor is bound to keep the cattle in a fit and proper place; *Bignell* v. *Clark*, 5 H. & N. 485; 29 L. J. Ex. 257.]

(*n*) *Jacobsohn* v. *Blake*, 6 M. & G. 919.

beer were distrained for rent, and the distrainor drew beer out of one of them, Lord Holt held, that it made him a trespasser, *ab initio*, as to that one only (*o*). This decision was acted upon in a modern case under the following circumstances. The defendant distrained for rent, and included in the inventory looms then at work, and without which there was a sufficient distress. The defendant remained in possession five days, and then withdrew on being paid rent and costs. The judge told the jury, that the distraining the looms entitled the plaintiff to a verdict for their value; and that as no damage was proved, it was for them to say, whether they would give more than the amount paid to redeem them. They found a verdict for the sum paid. A new trial was granted, unless plaintiff would consent to nominal damages being entered. Lord Abinger, C. B., said, "The Six Carpenters' case leaves it an open question how far the party becomes a trespasser, *ab initio*, as to the whole distress by an excess as to part. It is very reasonable that he should not, but that his liability should be limited according to the doctrine laid down by Lord Holt. This is only a constructive trespass as to the looms, and yet the plaintiff is asking for damages to the amount of the whole rent. It is the same as if the goods had been sold, and the value of the looms had been returned to him" (*p*).

Things distrainable conditionally.

By 51 H. III. c. 4, no man shall be distrained by his beasts that gain his land, nor by his sheep for any debt, if there can be found another distress, or chattels sufficient whereof they may levy the distress, or that is sufficient for the demand; except impounding of beasts that a man findeth in his grounds damage feasant (*q*). And the same conditional exemption extends to the instruments of a man's trade or profession (*r*). But a seizure of such property will not be tortious, where the only other distress consists of growing crops. The landlord has a right to resort to those subjects of distress which are im-

(*o*) *Dod* v. *Monger*, 6 Mod. 215.

(*p*) *Harvey* v. *Pocock*, 11 M. & W. 740.

[(*q*) This statute applies to the sheep of an undertenant of the landlord's tenant. Cart colts and young steers not broken in or used for harness or the plough, are not within it as beasts which gain the land; *Keen* v. *Priest*, 4 H. & N. 236; 28 L. J. Ex. 157.]

(*r*) 1 Inst. 47, a; *Simpson* v. *Hartopp*, Willes, 512.

mediately available by sale, and is not bound to take those which cannot be productive till a future period (*s*).

Statute 17 Geo. II. c. 38, s. 8, contains provisions similar to those of 11 Geo. II. c. 19, ss. 19 & 20, in case of distresses for poor rates.

(*s*) *Piggott* v. *Birtles*, 1 M. & W. 441.

CHAPTER XIV.

1. *Injury to land generally. Compensation clauses.*
2. *Mesne Profits.*
3. *Injury to easements.*

HAVING in the preceding chapter discussed those actions which are brought for wrongs affecting personal property, I shall employ the present chapter in examining those which affect real property.

Injuries to land.

1. In actions for injuries to land, the measure of damages is the diminished value of the property, or of the plaintiff's interest in it, and not the sum which it would take to restore it to its original state. This was decided in a case where the defendant had cut a ditch in the plaintiff's field, and carried away the soil (*a*). And so where the defendant has knocked down the plaintiff's house, built upon his land, which is on lease, the proper measure is the amount by which the selling price of the premises would be reduced by the wrongful act (*b*). This amount is to be estimated by the value of the old house, and not by the sum it would cost to build a new one (*c*). Even if the house were only leased to the plaintiff, who was himself under a covenant to repair, the same principle would apply, for his liability on the covenant is calculated in the same way (*d*). Of course, special loss or injury to the occupant might give rise to additional damages.

Damages vary according to plaintiff's interest in the land.

The damages will vary considerably, according to the plaintiff's interest in the land. This is obviously just, both to prevent the plaintiff getting extravagant recompense when his

(*a*) *Jones* v. *Gooday*, 8 M. & W. 146.
(*b*) *Hosking* v. *Phillips*, 3 Exch. 168.
(*c*) *Lukin* v. *Godsall*, Peake, Ad. Ca. 15; *Dodd* v. *Holme*, 1 Ad. & Ell. 493, 507; [*Hide* v. *Thornborough*, 2 C. & K. 250.]
(*d*) *Yates* v. *Dunster*, 11 Exch. 15.

interest is on the point of expiring, or very remote, and to prevent the defendant being forced to pay for the same damage several times over. The same act may give rise to different injuries; the tenant may sue for the injury to his possession, and the landlord for the injury to his reversion (*e*). And so where several are entitled in succession, as tenant for life, in tail, in fee, each can only recover damages commensurate to the injury done to their respective estates (*f*). Hence where a stranger cuts down trees, the tenant can only recover in respect of the shade, shelter, and fruit, for he was entitled to no more; and so it is where the occupant is tenant in tail after possibility of issue extinct; but the reversioner or remainder-man will recover the value of the timber itself (*g*). And so where the action was by the owner of a house against his lessee for opening a new door, whereby the house was injured, and the plaintiff was prejudiced in his reversionary interest; the jury found that the house was in no way injured by the act complained of, upon which nominal damages were entered for the plaintiff, subject to a special case; it was held that there ought to be a new trial, that the jury might say whether the reversionary right had been injured, which it might be by the evidence of title being weakened, though the house was as good as ever (*h*). [But a simple trespass, even though accompanied by a claim of right, is not necessarily injurious to the reversionary estate. To entitle a reversioner to sue, the wrong complained of must be in its nature permanent (*i*). Temporary nuisances, as for example, noise or

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(*e*) *Jefferson* v. *Jefferson*, 3 Lev. 130; *Jesser* v. *Gifford*, 4 Burr. 2141.

(*f*) *Evelyn* v. *Raddish*, Holt, N. P. 543; [*Johnstone* v. *Hall*, 2 Kay & J. 414; 25 L. J. Ch. 462.]

(*g*) *Bedingfield* v. *Onslow*, 3 Lev. 209, 4 Rep. 63, citing 27 H. VI. Waste, 8. [Where fruit trees were destroyed by fire through the negligence of the defendants, the measure of damages was held in the Supreme Court of New York to be the value of the trees as they stood on the land, not the diminished value of the land. It was laid down that although a fruit tree, differing from a timber tree, has strictly no commercial value as a tree independent of the land which sustains it, it has a value capable of estimation, having regard to its average annual products; *Whitbeck* v. *New York Central Rail Road Co.*, 36 Barbour (N. Y.), 644.]

(*h*) *Young* v. *Spencer*, 10 B. & C. 145. [But that was an action on the case in the nature of waste by a reversioner against his tenant, and what was said in it must be construed with reference to the subject matter; *per* Parke, J., in *Baxter* v. *Taylor*, 4 B. & Ad. 72.]

[(*i*) *Baxter* v. *Taylor*, 4 B. & Ad. 72.]

smoke, will not give a reversioner a right of action, even though his tenants leave in consequence, and the rent which can be obtained for the premises is reduced (*k*).]

Evidence of interest.

For the same reason the plaintiff must show what his interest is, and its duration. A tenant can only obtain nominal damages, unless he gives evidence of the time for which he is entitled to occupy (*l*); and an owner who has parted with the right to the surface of the soil, as for instance by granting a right of pasturage over it, with exclusive possession, cannot sue at all for any trespass which does not affect the sub-soil (*m*).

There is one curious case which seems at first to be at variance with this principle. In reality, however, upon the grounds upon which it was decided, it is in perfect accordance with it. J. J. demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually; the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of 375*l.* per half acre, *being after the same rate that the whole brick earth was sold for.* A stranger dug and took away brick earth. The plaintiff sued him, and on verdict for plaintiff, the question was whether he was entitled to the whole value of the earth, or only in proportion to his interest in it. It was admitted that there was more brick earth left than he could use up to the end of his term at the rate of half an acre per year. It was held by Mansfield, C. J., and Heath, J. (Chambre, J., contra), that the tenant was entitled to recover the whole value of the brick earth. They said that the lease amounted to an absolute sale of the whole brick earth, but the tenant was not to pay for the whole, unless he used the whole. Now supposing two actions to be brought, by the tenant and the landlord, it is clear that the sum of damages recovered must equal the full value of the earth. But they said the landlord could only recover nominal damages, because *non constat* that any of the earth would ever be left for the benefit of the

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[(*k*) *Mumford* v. *Oxford, Worcester, and Wolverhampton Ry. Co.*, 1 H. & N. 34; 25 L. J. Ex. 265; *Simpson* v. *Savage*, 1 C. B. N. S. 347; 26 L. J. C. P. 50.]

(*l*) *Twyman* v. *Knowles*, 13 C. B 222; 22 L. J. C. P. 143.

(*m*) *Cox* v. *Glue*, 5 C. B. 533.

reversion, as the tenant had the right of taking it away. Nor could he suffer by so much earth, upon which the tenant might pay additional rent, being taken away. Because whether it was taken away by the tenant himself or a stranger, he would equally have a right to recover on his covenant. If then the landlord could only obtain nominal damage, of course the full amount must be recoverable by the tenant. On the other hand, Chambre, J., was of opinion, that the property in the extra earth remained in the lessor, subject to the lessee's right to purchase it at a fixed price. That the beneficial account of the plaintiff in the earth taken by the defendant consisted in the difference between its value and the price he must have paid for it had he taken it himself. That all the remaining interest was in the reversioner. That the latter could maintain no action against the lessee upon his covenant for the value of the earth taken by a stranger. Consequently, that if the lessee recovered the whole value he would receive so much money of his lessor's which he could not be made to refund (*n*). It is clear that whichever side was right, the principle that neither could recover more than the amount of their interest was admitted.

Trespass by mining.

We have had occasion before to examine the case of a trespass committed by mining and carrying away the minerals severed (*o*). Here the most essential part of the wrong consists in the removal of the mineral. It is to be estimated at its value at the time the defendant began to take it away; that is, as soon as it existed as a chattel. This value will be the sale price at the pit's mouth, after deducting the expense of carrying it from the place in the mine where it was got to the pit's mouth, but not the cost of severing it. Separate compensation must be given for all injury done to the soil by digging, and for the trespass committed in dragging the mineral along the plaintiff's adit (*p*). It seems, however, that where there is a real disputed title the case is different, and the minerals are to be valued as if the soil in which they lay had been purchased from the plaintiff (*q*).

(*n*) *Attersoll* v. *Stevens*, 1 Taunt. 183.

(*o*) *Ante*, p. 291.

(*p*) *Morgan* v. *Powell*, 3 Q. B. 278; *Martin* v. *Porter*, 5 M. & W. 352; *Wild* v. *Holt*, 9 M. & W. 672.

(*q*) *Per* Parke, B., 9 M. & W. 673; *Wood* v. *Morewood*, 3 Q. B. 440, n.

Prospective injury from defendant's act.

Another question which has been already discussed is, when prospective loss arising from an injury to land may be allowed for, and when it may not. The rule is that when such prospective loss may be the subject of a fresh action when it occurs, it cannot be allowed for beforehand, and *vice versâ* (*r*). The former is the case when the act complained of is a continuing trespass upon the plaintiff's land, as, for instance, an unauthorised erection upon it (*s*); or is a continuing nuisance to it (*t*). Accordingly, a former recovery is no bar to any number of subsequent actions as long as the same cause continues; otherwise the defendant would be purchasing a right to commit a wrong (*u*). And it makes no difference that the defendant has no power to enter upon the land in question to remove the source of complaint, and that he would be a trespasser if he did so (*x*). For the same reason, viz., that a continuing trespass is a fresh ground of action every day, if part of the time during which the trespass was continued is beyond the period of limitation, damages can only be recovered for the trespasses within such period (*y*).

The contrary rule obtains where the original wrong consists of a single injury, or act of destruction. Accordingly, where the defendant had made an aperture in the plaintiff's mine, through which the water kept continually flowing into, and drowning it, it was ruled that no fresh action could be brought for loss accruing subsequently. The damages in the first action for making the aperture must be taken to have been a full compensation not only for the act, but for all the consequences which could arise from it (*z*).

Co-trespassers.

Where the defendant is one of a number of co-trespassers, as a member of a hunt, he is liable for the whole of the damage

(*r*) *Ante*, pp. 59, 62.

(*s*) *Holmes* v. *Wilson*, 10 A. & E. 503.

(*t*) *Shadwell* v. *Hutchinson*, 4 C. & P. 333; *Thompson* v. *Gibson*, 7 M. & W. 457.

(*u*) *Ibid.* [It follows that evidence cannot be given of the diminution in saleable value of the premises in consequence of the nuisance, because the plaintiff, after recovering for such diminution, might bring a fresh action, for the continuance of the nuisance; *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J. C. P. 290. In a second action a jury will be justified in giving such damages as may compel the defendant to abate it; *Ib.*, *per* Jervis, C. J., *Shadwell* v. *Hutchinson*, *supra*.]

(*x*) *Thompson* v. *Gibson*, *ubi sup.*

(*y*) *Wilkes* v. *Hungerford Market Co.*, 2 Bingh. N. C. 281.

(*z*) *Clegg* v. *Dearden*, 12 Q. B. 576.

done (*a*), but not for any malicious motive which may have actuated any others of the party (*b*).

When consequential loss may be allowed for as substantive damage.

Consequential loss resulting naturally from acts which are in themselves part of the trespass, may be proved as substantive damage, though it might be sued for as a distinct ground of action; for instance, infection caught by plaintiff's cattle from the entry of diseased cattle into his land (*c*); but where in trespass for breaking the plaintiff's house, evidence was offered that his wife was so terrified by the defendant's conduct that she took ill and died; this was received not as a ground for substantial damage, but merely as showing the violence of the defendant's conduct (*d*). Such an event could not be treated as a natural result of the trespass. Nor can any greater effect be given to loss arising from circumstances which are in themselves only matter of aggravation, and not part of the trespass. Trespass was brought for breaking and entering plaintiff's dwelling-house, and under a false and unfounded charge that plaintiff had stolen property in her house, searching the same, whereby the plaintiff was not only interrupted in the enjoyment of her dwelling-house, but her credit was injured by reason of a belief excited among her neighbours that she was a receiver of stolen goods. Two objections were taken. First, to the declaration, as uniting charges of trespass and slander which have different periods of limitation. Secondly, to the summing up of the judge, who had told the jury that if they believed the plaintiff's witnesses, he thought there was something very like a charge of having stolen goods in her house, and if so the damages undoubtedly ought not to be merely nominal. But Lord Ellenborough said, "As to the exception taken to the declaration, the trespass is the substantive allegation, and the rest is laid as a matter of aggravation only. On the other point it does not appear that the learned judge told the jury that they might go beyond the damages for the trespass, and consider the rest as a subject of substantive damage, or in any other wise than as connected with the trespass, and that is the constant course of considering it. In actions for

(*a*) *Hume* v. *Oldacre*, 1 Stark. 352.
(*b*) *Clark* v. *Newsam*, 1 Exch. 131, 139.
(*c*) *Anderson* v. *Buckton*, 1 Stra. 192.
(*d*) *Huxley* v. *Berg*, 1 St. 98.

false imprisonment, the jury look to all the circumstances attending the imprisonment, and not merely to the time for which the party was imprisoned, and give damages accordingly. So here, the breaking and entering the plaintiff's dwelling-house for the purpose of searching it, and under the false charge, constitutes the trespass, and the false charge was not left as a distinct and substantive ground of damage" (*e*).

Several trespasses.

On the other hand as many acts as the plaintiff chooses may be joined in the declaration, and allowed for as substantive damage when they are themselves trespasses; for instance, entering his land and carrying away his trees, or chasing and killing his cattle (*f*), or debauching his daughter (*g*). But in such a case each act must be laid with all the legal requisites to form a ground of action. Therefore, in trespass for entering the plaintiff's dwelling-house and taking away certain goods there, it was held that no damages could be given in respect of the goods, as there was no allegation that they were the property of the plaintiff (*h*).

In actions of trespass, even where there is no special damage, the jury are not limited to the actual injury inflicted, but may take all the circumstances into consideration: 500*l.* were held not to be excessive damages where the defendant, a man of rank, persisted in entering upon the plaintiff's land, and shooting his game, though required to desist, and conducted himself in other respects in a violent and abusive manner (*i*).

Compensation for acts done by authority of Parliament.

Injuries to land frequently arise from the operations of public companies, acting within the powers given them by their acts. In all such cases provisions are made for giving compensation to the parties injured. The most important of these provisions are contained in the Lands Clauses Consolidation Act, 8 Vict. c. 18, which is incorporated with every act authorising a public company to purchase or take land for its undertaking. [These statutory provisions for making compen-

(*e*) *Bracegirdle* v. *Orford*, 2 M. & S. 77, 79.
(*f*) *Anderson* v. *Buckton*, 1 Stra. 192.
(*g*) *Bennett* v. *Allcott*, 2 T. R. 166.
(*h*) *Pritchard* v. *Long*, 9 M. & W. 666.
(*i*) *Merest* v. *Harvey*, 5 Taunt. 442. [On the other hand, evidence of asserted title would seem to be admissible in reduction of damages. See *per* Erle, C. J., *Skull* v. *Glenister*, 16 C. B. N. S. at p. 103; 33 L. J. C. P. at p. 188.]

sation for lands taken or injuriously affected under the authority of parliament do not come properly within the scope of this treatise, and the cases decided upon them, and upon analogous clauses contained in other acts, are now so numerous and important that it has been thought useless to attempt to discuss them within the limits which must be assigned to them here. The reader is therefore referred to works in which the subject is specially considered.]

Mesne profits.

2. The action for mesne profits is in form an action of trespass, brought after a judgment in ejectment (*e*), to recover damages for the previous occupation of the land. It may be brought either against the person actually in possession of the land, at any time during the existence of the plaintiff's title, though only a tenant (*f*) or servant of the original ejector (*g*); or against his landlord who let him into possession, though such landlord be himself a tenant of the plaintiff, and his underlessee has held over against his will (*h*). But when the ground of the action is the bare fact of possession, damages can only be recovered for the time possession was actually retained (*i*), and in no case can the plaintiff claim for any period subsequent to an offer by the defendant to restore him possession (*k*).

Against whom it may be brought.

Entry relates back to origin of title.

There are several instances in which the party entitled to possession cannot maintain trespass before entry; as a lessee for years (*l*), heir, reversioner, purchaser, or disseisee (*m*), assignee (*n*), or a parson before induction (*o*). But execution of the writ of possession, or actual possession taken after a judgment in ejectment, entitles the plaintiff to recover damages for any period over which he can prove a right to possession, even prior to the day of demise laid in the declaration under

(*e*) *Quære*, Whether it may be maintained before judgment? *Pulteney* v. *Warren*, 6 Ves. 80.
(*f*) *Holcomb* v. *Rawlyns*, Cro. Eliz. 540.
(*g*) *Girdlestone* v. *Porter*, Woodf. L. & T. 653, 7th ed. [By Harrison and Horn.]
(*h*) *Ibbs* v. *Richardson*, 9 A. & E. 849.; *Doe* v. *Harlow*, 12 A. & E. 40.
(*i*) *Girdlestone* v. *Porter*, *ubi sup.*
(*k*) 9 A. & E. 853.
(*l*) Bac. Abr. Lease, M.
(*m*) Com. Dig. Trespass, B. 3.
(*n*) *Cook* v. *Harris*, 1 Ld. Raym. 367.
(*o*) 2 B. & A. 470.

the old form. The reason is, that the entry when made relates back to the origin of the title, and all who occupied in the meantime, by whatever title they came in, are answerable to him for their occupation (*p*). But where the party in possession is not a trespasser at all, until his title is made void by entry, as where he holds against the reversioner or remainderman by virtue of a fine levied by tenant for life, mesne profits can only be recovered from the date of such entry (*q*). Even in equity it seems there is no remedy (*r*).

Effect of judgment in ejectment.

By 15 & 16 Vict., c. 76, s. 207, the effect of a judgment in ejectment under the new form of proceeding given by that act, shall be the same as that of a judgment in the action of ejectment previously in use. Such a judgment then, when pleaded (*s*), will be conclusive as to the right to possession against the defendant in ejectment, and all persons claiming under him up to the day on which title is laid. For any damages claimed previously to that day, strict proof of title will be necessary (*t*).

Damages.

Damages in this action are not confined to the mere rent of the premises, but the plaintiff may recover for the trouble and expense he has been put to. And Gould, J., said that he had known four times the value of the mesne profits given by a jury in this action (*u*). So any consequential damage may be recovered; as for instance, the loss which the plaintiff has suffered by the defendant's shutting up an inn, which was the subject of the ejectment, and destroying the custom. Such damage, however, must be specially laid (*x*).

Where no evidence is given as to the length of time during which the defendant was in possession, no more than nominal damages can be given, and the case is the same even though a date be laid in the declaration, not under a *viz.*, and judg-

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(*p*) *Holcomb* v. *Rawlyns, ubi sup.; per* Coltman, J., 5 M. & Gr. 764; 774; *Barnett* v. *Earl of Guildford*, 11 Ex. 19; 24 L. J. Ex. 281, 284.

(*q*) *Lee Compere* v. *Hicks*, 7 T. R. 727; *Hughes* v. *Thomas*, 13 East, 474.

(*r*) *Reynolds* v. *Jones*, 2 Sim. & Stu. 206; *Dormer* v. *Fortescue*, 3 Atk. 124, *contra*.

(*s*) *Matthew* v. *Osborne*, 13 C. B. 919; 22 L. J. C. P. 241; [*Wilkinson* v. *Kirby*, 15 C. B. 430; 23 L. J. C. P. 224. A county court order for giving up possession, made under 19 & 20 Vict. c. 108, s. 50, has not an analogous effect; *Campbell* v. *Loader*, 3 H. & C. 520; 34 L. J. Ex. 50.]

(*t*) *Aslin* v. *Parkin*, 2 Burr. 665.

(*u*) *Goodtitle* v. *Tombs*, 3 Wils. 121; 3 T. R. 547, S. P.

(*x*) *Dunn* v. *Large*, 3 Dougl. 335.

ment go by default; for the date is not material or traversable, and therefore not admitted (*y*).

Costs of previous ejectment.

One common ground of damage used to be the costs of ejectment, which under the form of fiction in use till lately, could not be recovered in that action when the landlord or tenant did not appear, or having appeared, did not confess lease, entry, and ouster at the trial (*z*). In respect to these the rule laid down was, that where the judgment was taken in such a form as admitted of the costs being taxed, those costs alone were recoverable, and no extra costs, though *bonâ fide* incurred (*a*). The apparent exceptions to this rule were in cases where costs could not be taxed; for instance, where judgment obtained by the defendant had been reversed in error, where a court of error could not award costs (*b*); or where judgment had gone by default, in which case it was not the practice for the officers to tax against the casual ejector (*c*). In the latter case there seems now to be no objection to signing judgment and taxing costs against the real defendant, as his name appears on the record (*d*). The former case stands still on its original footing. The old rule still prevails as to costs upon error, viz., that when judgment is reversed, the party ultimately prevailing pays his own costs in error, though he receives his costs in the original action. This doctrine is unaffected either by 15 & 16 Vict. c. 76, s. 148,

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(*y*) *Ive* v. *Scott*, 9 Dowl. 993. [The effect of judgment by default in ejectment, as evidence of the defendant's possession, in an action for mesne profits, was discussed recently in the Court of Exchequer. Kelly, C. B., was of opinion that taken alone it was no evidence of the defendant's possession at any time. Channell, B., and Cleasby, B., considered it to be *primâ facie* evidence that the defendant was in possession at the date of the writ of ejectment, but not evidence of his possession for the period during which the plaintiff claimed title in the writ; *Pearse* v. *Coaker*, L. R. 4 Ex. 92; 38 L. J. Ex. 82.]

(*z*) Tidd. Prac. 9th ed., 1243. [An allegation in the declaration that the plaintiffs had incurred great expense in recovering possession, has been held to support a claim for the costs of previous ejectment; *Pearse* v. *Coaker*, *supra*.]

(*a*) *Doe* v. *Davis*, 1 Esp. 358; *Symonds* v. *Page*, 1 C. & J. 29; *Doe* v. *Filliter*, 13 M. & W. 47; *Brooke* v. *Bridges*, 7 Moore 471; *Doe* v. *Hare*, 2 Dowl. 245.

(*b*) *Nowell* v. *Roake*, 7 B. & C. 404.

(*c*) *Doe* v. *Huddart*, 2 C. M. & R. 316.

(*d*) See 15 & 16 Vict. c. 76, ss. 177, 206. [The received opinion is, however, that this Act does not entitle the plaintiff to costs upon a judgment by default, and that they must still be recovered by action for mesne profits; 2 Ch. Arch. 1037, 12th ed.; Cole on Ejectment, 131; Day's C. L. P. Act, 147, 3rd ed.]

which provides that the proceeding in error shall be a step in the cause, or by the 25 Pl. rule of Hilary Term, 1853, which says that the costs of proceedings in error are to be costs in the cause. The meaning of that rule is, that where the party succeeding is entitled to his costs in error, they are to be taxed as costs in the cause (*e*). There are express provisions in the Common Law Procedure Act, 1852, that where the defendant confesses the action (*f*), or judgment is given against him (*g*), execution may issue for costs as well as for the recovery of possession. In none of these cases then is it likely that costs will for the future be sued for in an action for mesne profits.

Payments in reduction of damages.

Improvements.

If the defendant has made any payments while in possession, for which plaintiff would be liable, as ground rent [or rates and taxes], he is entitled to have it taken in reduction of damages (*h*). In America the courts go much further. There a *bonâ fide* occupant of land is allowed to mitigate damages in an action by the rightful owner, by setting off the value of his permanent improvements, made in good faith, to the extent of the rent and profits claimed (*i*). This doctrine, however, has never been asserted in England as far as I am aware. In one case where a party had permitted buildings to be erected upon his property, by a person who acted under a mistaken impression that the land was his own, a Court of Equity restrained an action for mesne profits by injunction, in order to compel the plaintiff to allow the value of the buildings as a set-off (*k*). This in itself shows that the defendant would have had no claim for compensation at law, and even in equity the argument in his favour rested solely on the fact that the plaintiff had stood by and countenanced his acts, which amounted to a fraud upon him. Nor does the doctrine seem well founded, as a mere matter of natural justice. The improvements may be very valuable, but they may be quite unsuited to the use which

(*e*) *Fisher* v. *Bridges*, 4 E. & B. 666; 24 L. J. Q. B. 165; [*Marshall* v. *Jackson*, 4 E. & B. 669, n.; 24 L. J. Q. B. 166, n.; *Windle* v. *Barker*, 25 L. J. Q. B. 349.]

(*f*) S. 203.

(*g*) Ss. 185, 197.

(*h*) *Doe* v. *Hare*, 2 C. & M. 145; [*Barber* v. *Brown*, 1 C. B. N. S. at p. 150; 26 L. J. C. P. at p. 49.]

(*i*) Sedg. Dam. 125; [*Morrison* v. *Robinson*, 31 Penn. 456.]

(*k*) *Cawdor* (*Earl of*) v. *Lewis*, 1 Y. & C. 427.

the plaintiff intends to make of his land. Even if they are such as he would have wished to make, they may also be such as he could not have afforded to make. To compel him to pay for them, or to allow for them in damages, which is all the same, is quite as unjust as it would be to lay out money in any other investment for a man, and then compel him to adopt it, *nolens volens*.

It is no answer to this action that the plaintiff had entered a *remittitur damna* upon the record in the action of ejectment (*l*).

Mesne profits may in some cases be recovered in ejectment.

Where ejectment is brought by landlord against tenant, and due notice of trial has been served on the tenant or his attorney, the plaintiff may always go into evidence of mesne profits, and obtain a verdict for them down to the time of verdict given; even though the record has contained no notice that the demand would be made (*m*). But such recovery shall be no bar to an action for mesne profits from the time of verdict to delivery of possession (*n*).

Executors.

Formerly executors could not sue or be sued in this action; but now it seems they may by 3 & 4 W. IV. c. 42, s. 2, provided the action be brought *by* the executors or administrators within a year after death, and for injuries committed within six calendar months before death; and similarly as to actions *against* executors or administrators, except that the action must be commenced within six months after they have taken upon themselves the administration of the estate.

Easements.

3. In actions for injuries to easements, such as rights of way, watercourses, light, common, and so forth, no rule can be laid down as to the measure of damages. They will vary in each case, according to the species and amount of injury caused. Frequently, however, such actions are brought where no actual injury has been suffered, to try a right; and the question is, whether the plaintiff is entitled to nominal damages.

When it is necessary to prove actual damage.

In such cases the rule may be laid down, that where an actual infringement of right has taken place an action will lie, and the plaintiff will be entitled to a verdict with nominal

(*l*) *Harper* v. *Eyles*, 3 Dougl. 399.
(*m*) *Smith* v. *Tett*, 9 Exch. 307; 23 L. J. Ex. 93.
(*n*) 15 & 16 Vict. c. 76, s. 214.

damages, though no real loss has been sustained. Hence in actions by commoners against strangers for interfering with their rights of common (*o*); or by the owners of lands and houses, for violation of their rights of ways, watercourses, light and air (*p*), there is no necessity to show any actual or substantial damage resulting from the act complained of. Wherever a right has been violated, the law will presume damage, and the mere fact that such acts, if submitted to, would lay the foundation of a fresh right in the wrong-doer, adverse to the original proprietor, is itself support for an action (*q*). A strong instance of this doctrine arose in a very recent case. By deed between plaintiff and defendant, owners of adjoining closes, it was agreed that during the first ten days of every month the defendant should have the exclusive use, for purposes of irrigation, of the waters of a stream which flowed through his lands to the plaintiff's. That at all other times the water should be under the plaintiff's control, and that it should flow upon his land through the defendant's in a channel specifically described. Defendant altered the stream in its course through his own land, by cutting a new channel. The stream however entered the plaintiff's land at exactly the same point as before, and in the same quantity. No damage of any sort arose. It was held, however, that under the terms of the deed the plaintiff had a right to have the stream flowing in the specified channel, and was entitled to nominal damages (*r*).

Such legal damage, however, will only be presumed where there has been a clear violation of a right. The facts from which it will be presumed differ greatly according to the subject-matter of the right, and the nature of the interests of the parties in it. For instance, commonage is a matter of private and exclusive right. Any assertion of the same right

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(*o*) 1 W. Saund. 346, a; [1 Wms. Notes to Saund. 626.] *Wells* v. *Watling*, 2 Bl. 1233; *Hobson* v. *Todd*, 4 T. R. 71; *Pindar* v. *Wadsworth*, 2 East, 154.

(*p*) *Embrey* v. *Owen*, 6 Exch. 353; *Bower* v. *Hill*, 1 Bingh. N. C. 549; *Wood* v. *Waud*, 3 Exch. 748; *Dickinson* v. *G. Junc. Canal Co.*, 7 Exch. 282; *Rochdale Canal Co.* v. *King*, 14 Q. B. 122; *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287.

(*q*) 1 B. & Ad. 426, *per* Taunton, J.; [*Harrop* v. *Hirst*, L. R. 4 Ex. 43; 38 L. J. Ex. 1.]

(*r*) *Northam* v. *Hurley*, 1 E. & B. 665.

by an unauthorised person is an injury for which an action will lie. But light, air, and water are matters *publici juris*, which cannot be monopolised; all may use them who have a right of access to them, and an action only lies for such an unreasonable use as deprives the plaintiff of his just benefit from them in turn (*s*).

Actions by reversioners, &c.

So also any act, however temporary, which disturbs the occupant of land in the possession of all his rights attaching to it, is ground for an action by him. But the reversioner can only sue in respect of some wrong which is calculated to injure his reversion; and the fact of its being of such an injurious character must appear upon the record, and be proved at the trial, or be capable of being assumed as proved after verdict (*t*).

The same obstruction to the plaintiff's rights may be the subject of continual actions and continual damages, till it is discontinued (*u*).

When actual damage must be proved.

In some cases, however, actual damage constitutes the gist of the action, and must be stated and proved. This takes place where the wrong complained of is one of a public nature, which can only become ground of action by an individual upon proof of actual damage to himself resulting from it (*x*). But though particular damage must be shown and established, it is neither necessary to lay, nor to prove, special damage in its technical sense. As, for instance, where the injury consisted in obstructing the access to plaintiff's house, and consequent loss of trade, it was held not to be necessary to show the specific customers who were hindered (*y*).

In actions by the commoners against the lord, or any one acting under the authority of the lord, for putting cattle upon

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(*s*) *Embrey* v. *Owen*, 6 Exch. 353; *Wood* v. *Waud*, 3 Exch. 748; *Taylor* v. *Bennett*, 7 C. & P. 329; *Pringle* v. *Wernham*, *ibid.*, 377; *Wells* v. *Ody*, *ibid.*, 410; *Williams* v. *Morland*, 2 B. & C. 910.

(*t*) *Hopwood* v. *Schofield*, 2 M. & Rob. 34; *Jesser* v. *Gifford*, 4 Burr. 2141; *Kidgill* v. *Moore*, 9 C. B. 364. See *Jackson* v. *Pesked*, 1 M. & S. 234; *Young* v. *Spencer*, 10 B. & C. 145; [*Bell* v. *Midland Ry. Co.*, 10 C. B. N. S. 287; 30 L. J. C. P. 273; *Metropolitan Association* v. *Petch*, 5 C. B. N. S. 504; 27 L. J. C. P. 330; and *ante*, p. 331.]

(*u*) *Vide ante*, p. 63.

(*x*) 9 Rep. 113, a; *Wilkes* v. *Hungerford Market Co.*, 2 B. N. C. 281; *Rose* v. *Miles*, 4 M. & S. 101; *Greasly* v. *Codling*, 2 Bingh. 263; [*Winterbottom* v. *Earl of Derby*, L. R. 2 Ex. 316; 36 L. J. Ex. 194.]

(*y*) *Rose* v. *Groves*, 5 M. & Gr. 613.

the common, damage must be shown. He has a right to do so, leaving sufficient for the commoners, and the cause of action clearly does not arise till such damage is shown (*z*).

(*z*) *Hobson* v. *Todd*, 4 T. R. 73; *per* Buller, J., 1 W. Saund. 346, b. [1 Wms. Notes to Saund. 627.]

CHAPTER XV.

1. *Malicious Prosecution.*
2. *False Imprisonment and Assault.*
3. *Personal Injury caused by Negligence.*
4. *Actions against Sheriff.*
5. *Actions against Attorney.*
6. *Actions against Witness.*
7. *Defamation.*
8. *Breach of Promise of Marriage.*
9. *Seduction.*
10. *Adultery.*

THE two previous chapters were taken up with those torts which consist in injuries to property of a tangible nature, such as goods or land. The present chapter will include injuries to the person, or to the relative rights which exist between the plaintiff and some third party. Breach of promise of marriage should technically have been ranged among other actions on contracts. Practically, however, it is always treated as a tort, and as it is not governed by the same principles as any other contract, no confusion is caused by considering it here.

Action for malicious prosecution must show damage.

1. In order to support an action for a malicious prosecution, or suit, it is necessary to show some damage resulting to the present plaintiff from the former proceeding against him. This may be either the damage to a man's fame, as if the matter he is accused of be scandalous, or where he has been put in danger to lose his life or limb, or liberty; or damage to his property, as where he is obliged to expend money in necessary charges to acquit himself of the crime of which he is accused (*a*). And the damage must be one either already fallen upon the plaintiff, or else inevitable (*b*).

Accordingly where a declaration merely charged the preferring an indictment for an assault, and no evidence was given

(*a*) *Per* Holt, C. J., *Saville* v. *Roberts*, 1 Ld. Raym. 374.
(*b*) B. N. P. 13.

but the bill of indictment for the assault with ignoramus returned thereon, the plaintiff was nonsuited; and Mansfield, C. J., said, "I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages, because he clearly has not proved that he has sustained any. I can understand the ground upon which an action shall be maintained for an indictment which contains scandal; but this contains none, nor does any danger of imprisonment result from it; this bill was a mere piece of waste paper. All the cases in B. N. P. 13, are directly against this action, for the author speaks of putting the plaintiff to expense and affecting his good fame, neither of which could be done here. If this action could be maintained, every bill which the grand jury threw out would be the ground of an action" (*c*). And so in a case where the writ had been sued out against a party by mistake, and no arrest or imprisonment ever actually took place, but the party of his own accord paid the bailiff and put in bail, nonsuit was ordered (*d*).

Liability to extra costs not a ground of damage,

But the liability to pay extra costs beyond those which can be recovered on taxation, is not a damage recognised in law; consequently where a declaration stated that defendant in the name of J. S., whom he knew to be insolvent, maliciously, &c. sued the plaintiff, in which action J. S. was nonsuited, and proceeded to allege that the now plaintiff was forced to pay costs which he was unable to recover from J. S., who was and is unable to pay the same; the Court held the declaration bad for want of an averment that the plaintiff had applied for costs, which might be the only reason he had not recovered them. Maule, J., said, "In order to make the non-payment of costs a legitimate subject of damage, it must be shown that they are such costs as properly follow the judgment of the Court in which the action was brought; but here it does not appear there were any such costs, for he was entitled to none unless he applied for them, and it does not appear he has applied" (*e*).

and cannot be recovered.

For the same reason, where costs are taxed in the former

(*c*) *Byne* v. *Moore*, 5 Taunt. 187.
(*d*) *Bieten* v. *Burridge*, 3 Camp. 139.
(*e*) *Cotterell* v. *Jones*, 11 C. B. 713.

proceedings, no extra costs can be recovered as damages in this action (*f*).

Malice and want of probable cause must also be proved (*g*), and the amount of damages given by the jury will always be greatly influenced by the species of evidence afforded upon this point. Malice.

It was held in one case that a witness may, with a view to showing probable cause, be asked whether the plaintiff was not a man of notoriously bad character (*h*). But the contrary doctrine has been several times laid down. Where the action was for maliciously and without probable cause procuring the plaintiff to be arrested on a charge of felony, a witness was asked whether he had not searched the plaintiff's house upon a former occasion, and whether he was not a person of suspicious character. Wood, B., refused to allow the question. In actions for slander, he said, such evidence was admissible for the purpose of mitigating the damages, and not to bar the action, and that in this case such evidence would afford no proof of probable cause to justify the defendant (*i*). So where the action was trespass for false imprisonment on a charge of obtaining money under false pretences, a policeman was asked on cross-examination whether he had not had the plaintiff in custody before, and also what was her general character? Gurney, B., after consulting the rest of the Court, refused to admit the evidence, even in mitigation of damages (*k*). And similarly where the declaration contained counts for slander, and for a malicious arrest and imprisonment, Abbott, C. J., refused to allow the plaintiff to give evidence of general good character, saying that if such evidence was to be admitted on the part of the plaintiff, then the defendant must be allowed Evidence of probable cause.

(*f*) *Sinclair* v. *Eldred*, 4 Taunt. 7; *Grace* v. *Morgan*, 2 Bingh. N. C. 534; overruling *Sandback* v. *Thomas*, 1 St. 306; *Gould* v. *Barratt*, 2 M. & Rob. 171.

(*g*) *Farmer* v. *Darling*, 4 Burr. 1971; *Gibson* v. *Chaters*, 2 B. & P. 129. [The law is settled in England that the jury must find the facts on which the question of reasonable and probable cause depends, and the judge must then determine whether the facts found do constitute reasonable and probable cause. No definite rule can be laid down for the exercise of the judge's judgment; *Lister* v. *Perryman*, L. R. 4 H. L. 521, 39 L. J. Ex. 177. In Scotland the question is treated as an inference of fact for the jury. *Ib.*, *per* Lord Colonsay.]

(*h*) *Rodriguez* v. *Tadmire*, 2 Esp. 721.

(*i*) *Newsam* v. *Carr*, 2 St. 69.

(*k*) *Downing* v. *Butcher*, 2 M. & Rob. 374.

to go into evidence to prove that the plaintiff was a man of bad character (*l*). This was a particularly strong case, for the defendant had pleaded in justification, averring the charge of felony to be true. In a very recent case, where the action was for giving the plaintiff in charge, on the ground of his having stolen oysters from the defendant's bed, evidence was offered of a previous conviction of a *third* party for the same offence. The defendant, however, was not aware of such conviction at the time he gave the plaintiff into custody. The Court decided that the evidence was properly rejected on that account. Pollock, C. B., in delivering the judgment of the Court, said, "The only ground on which the defendant could use any evidence for the purpose of showing that he was acting *bonâ fide*, was with reference to the impression that the conviction would make upon his own mind, and not as to the fact itself. It was for this purpose perfectly competent for the defendant to prove that he had been informed of the conviction, and to show all that had been laid before him on which he might form an opinion upon the subject. But in this case the conviction itself never had been laid before him; he was not present at the trial; it could never have produced any effect upon his mind. We are of opinion, therefore, that it was very properly rejected, although on the other ground which I have mentioned, it might undoubtedly have been received for the purpose of establishing, *bonâ fide*, a sincere opinion, on the part of the defendant, that the plaintiff had been guilty of felony" (*m*). Of course if the previous conviction had been of the plaintiff himself, the evidence would have been admissible *a fortiori*. This seems to bear strongly upon the points under discussion. There is no doubt a distinction between evidence of general bad character, and a previous conviction for exactly the same offence as that charged under a mistake. The latter fact probably affords a stronger presumption of guilt than the former. Yet if a person who has erroneously charged another with burglary, may show that he was in fact previously convicted of burglary, it is hard to see why he may not also show that he was well known as a thief and associate of burglars. Such evidence would certainly be

(*l*) *Cornwall* v. *Richardson*, Ry. & M. 305.
(*m*) *Thomas* v. *Russell*, 23 L. J. Ex. 233; 9 Exch. 764.

a much stronger justification of the charge, than it would be to show that a third party had previously committed a burglary in the defendant's house, and been convicted of it. It shows a fair reason for suspecting the plaintiff, whereas evidence, such as that in the case alluded to, merely shows ground for suspecting the world in general of a capacity for the particular crime, and a tendency to it.

Cases of this sort vary so much according to the nature of the charge preferred, or action brought, according to the rank and motives of the parties, that the damages are always a mere matter of speculation. The talents of the counsel, the temper of the jury, and the view taken by the judge, have a greater influence upon their amount than any principles of law which can be laid down.

Assault and false imprisonment.

2. The damages in actions for assault or false imprisonment will also vary in the same manner, according to the circumstances of the case. The same remarks will also apply to the evidence which may be adduced in proof of probable cause. Where the action was for an arrest in Bristol, without reasonable and probable cause, it was held that the defendants, who were constables of Oxford, might show in mitigation of damages, that they had taken the plaintiff on suspicion of stealing a horse; but that as the arrest had been made out of their jurisdiction, they could not give the matter in evidence, under the general issue, as an entire defence by virtue of the stat. 25 Jac. I. c. 12 (*n*). A justification of a false imprisonment, on the ground that the defendant had reasonable and probable cause to suspect the plaintiff of being guilty of a felony, is very different in its effect upon the damages from an unsuccessful plea that the plaintiff was and is guilty of the felony. The former is in the nature of an apology for the defendant's conduct. The latter is a persistence in the original charge, which is in itself a ground for aggravation of damages. And it makes no difference that the plea was abandoned at trial, the defendant's counsel saying that the charge was ungrounded; and that the plea was the act of the pleader, and not of the defendant (*o*).

(*n*) *Rowcliffe* v. *Murray*, Car. & M. 513.
(*o*) *Warwick* v. *Foulkes*, 12 M. & W. 507.

Mitigation of damages.

No evidence which if pleaded would be a bar, can be given in evidence in mitigation of damages. Accordingly, where the action was for an assault, and there was no plea of justification, but evidence was offered that the plaintiff was one of the crew on board the defendant's ship, and that the beating was in consequence of his misconduct; it was ruled that as these facts might have been pleaded in bar, the jury should not consider them in estimating damages for the injury inflicted (*p*).

Remand by magistrate.

Where the action is trespass for false imprisonment, damages cannot be given for a remand by the magistrate, which is a distinct judicial act proceeding from himself alone (*q*). The action should be in case, alleging malice and want of probable cause, or trespass against the magistrate (*r*).

On the other hand, a recovery in an action for false imprisonment is no bar to another action for a malicious prosecution. They are altogether different causes of action. The taking a man up on a charge of felony is distinct from going before a grand jury, and falsely and maliciously taking an oath to get a bill found against him, and then going before a petty jury and trying to induce them to find him guilty. Consequently, in the action for false imprisonment, none of the circumstances connected with the subsequent prosecution can be proved, or allowed for in damages (*s*).

Joint actions, and actions against several.

Where the action is a joint one, by or against several, only those circumstances which prove a joint injury to or from all can be compensated for. Therefore, where several plaintiffs sue, on account of a joint imprisonment, they may recover in respect of money which they paid jointly for their release, but not on account of the suffering caused by the imprisonment, for that was a separate injury to each (*t*). And so in the case of a joint trespass, the true measure of damage is the whole injury which the plaintiff has suffered from the joint act. But aggravated damages cannot be given on account of the peculiar malice of one. In such a case the plaintiff ought to

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(*p*) *Watson* v. *Christie*, 2 B. & P. 224.
(*q*) *Lock* v. *Ashton*, 12 Q. B. 871.
(*r*) *Morgan* v. *Hughes*, 2 T. R. 225, 231.
(*s*) *Guest* v. *Warren*, 9 Exch. 379.
(*t*) *Haythorn* v. *Lawson*, 3 C. & P. 196; *Barratt* v. *Collins*, 10 Moo. 446.

elect the party against whom he means to get aggravated damages (*u*).

Justices of the peace.

It may be as well to remark that every action against a justice of the peace, for anything done by him in the execution of his duty as such justice, and within his jurisdiction, must be on the case, and allege the act to have been done maliciously and without probable cause (*x*). Where he has no jurisdiction, or exceeds his jurisdiction, he may still be sued in trespass, subject to certain provisions as to quashing the conviction (*y*). And in no case is the plaintiff to have more than twopence damages, where it appears that he was guilty of the offence of which he was convicted, or liable by law to pay the money ordered to be paid, and that he has undergone no greater punishment than that assigned by law to the offence of which he was convicted, or for non-payment of the money ordered (*z*).

Personal injury caused by negligence.

3. Very little can be said with certainty as to damages for personal injuries inflicted by negligence. Loss of time during the cure, and expense incurred in respect of it, are of course matters of easy calculation. Pain and suffering undergone by the plaintiff are also a ground of damage (*a*). And in this point such an action differs from one brought by the personal representatives, where a death has ensued (*b*). Any permanent injury, especially when it causes a disability from future exertion, and consequent pecuniary loss, is also a ground of damage. This is one of the cases in which damages most signally fail to be a real compensation for the loss sustained. In one case Parke, B., said, "It would be most unjust if, whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life" (*c*). No rule can be laid down in

(*u*) *Clark* v. *Newsam*, 1 Exch. 131, 139; and see *Gregory* v. *Cotterell*, 22 L. J. Q. B. 217.
(*x*) 11 & 12 Vict. c. 44, s. 1.
(*y*) S. 2.
(*z*) S. 13.
(*a*) 18 Q. B. 111.
(*b*) See *post*, p. 392.
(*c*) *Armsworth* v. *S. E. Ry. Co.*, 11 Jur. 760; cited 18 Q. B. 104.

such a case; and although juries are frequently cautioned not to let their verdict be influenced by the poverty of the plaintiff and the wealth of the defendant, yet the caution is probably seldom much attended to. To examine how far it is deserving of very strict obedience, would furnish material for much longer discussion than I wish to yield to it here.

Actions against the sheriff.

4. Actions against the sheriff are either by the creditor, for some neglect of duty which deprives him of his proper remedy against his debtor; or by the debtor, or supposed debtor, or his representatives, for some unlawful exercise of authority against him.

I. Actions by the creditor against the sheriff.

Replevin.

One of the most common of these arose [before the passing of 19 & 20 Vict. c. 108] out of the action of replevin. Stat. 11 Geo. II. c. 19, s. 23, enacted that sheriffs and other officers granting replevins should take from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect, and without delay, and for a return of the goods. By sect. 22, if the plaintiff in replevin should discontinue, be nonsuited, or have judgment against him, the defendant should recover double costs. Stat. 5 & 6 Vict. c. 97, s. 2, enacted that, instead of double costs, the defendant should have such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the suit, as should be taxed by the proper officer.

[By 19 & 20 Vict. c. 108, ss. 63, seqq., the powers and responsibilities of sheriffs with respect to replevin bonds and replevins were put an end to; and the registrar of the county court of the district in which the distress subject to replevin is taken, is empowered to approve replevin bonds and grant replevins, and issue all necessary process. The goods are to be replevied to their owner on his giving security, to be approved by the registrar, for an amount sufficient to cover the rent or damage and probable costs of the cause, conditioned to prosecute the action with effect and make return of the goods. The security is to be a bond with sureties to the other party, or a deposit in money. The registrar is bound to use proper discretion in

approving replevin bonds (*d*), and it would seem, that if he is guilty of negligence an action will lie against him at the suit of the party damnified (*e*). In such case the principles acted upon in actions against the sheriff will apply.]

If the sheriff failed to take a bond, or took one with insufficient sureties, an action upon the case lay against him, and in such an action he was liable to the same extent as the sureties would have been, had he done his duty (*f*). The question then was, to what extent were the sureties liable ?

Extent of liability upon replevin bond.

The extreme limit of liability was, in all cases, the penalty of the bond, and the costs of suing upon it (*g*). Within this limit, however, the liability might vary ; and for a long time there was great doubt as to the rule by which the variation was to be regulated. It is obvious that the rent distrained for might either be greater or less than the value of the goods distrained. Accordingly, where it was greater, the struggle on the part of the plaintiff was to extend the damages to the whole amount due ; where it was less, to the whole value of the goods. On the other hand, the sheriff tried to limit his liability in all cases to the value of the goods, and to escape all claim for costs. The latter attempt, which was sanctioned by the Court, in *Yea* v. *Lethbridge* (*h*), was decided against in *Paul* v. *Goodluck* (*i*). The former point, however, was still left open. It was, however, afterwards settled, that the object of the statute was only to place the parties in the same position as if no replevin bond had been executed. At Common Law the landlord had only his remedy against the person who brought the action of replevin. The replevin bond gave him the additional security of the sureties, and the double costs. That was the whole effect the act could have had. Consequently, if the rent was less than the value of the goods, the object of the statute was satisfied by giving

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[(*d*) *Young* v. *Brompton, &c., Waterworks Co.*, 1 B. & S. 675 ; 31 L. J. Q. B. 14.]

[(*e*) 2 Ch. Arch. Pr. 1104, 12th ed.]

(*f*) *Evans* v. *Brander*, 2 H. Bl. 550 ; *Baker* v. *Garratt*, 3 Bingh. 56, 59 ; *Paul* v. *Goodluck*, 2 B. N. C. 220.

(*g*) *Hefford* v. *Alger*, 1 Taunt. 218 ; *Jeffery* v. *Bastard*, 4 Ad. & Ell. 829 ; *per* Littledale, J., *Evans* v. *Brander*, 2 H. Bl. 547 ; overruling *Concanen* v. *Lethbridge*, 2 H. Bl. 36.

(*h*) 4 T. R. 433.

(*i*) 2 Bingh N. C. 220.

the amount of the rent and the costs; otherwise the landlord would have been getting more than the rent due. If the amount of the rent exceeded the goods, then the landlord was entitled to the value of the goods, with the costs, as before; otherwise, his remedy against the sureties would have been greater than it had been against the tenant (*j*). In the former of those cases, Patteson, J., pointed out that some of the authorities relied on as opposing this view, really were not against it, as they did not state which, the rent or the goods, were greater in value. For instance, in *Ward* v. *Henley* (*k*), where it was held that the rent in arrear and costs was the measure of damages against the sureties, it does not appear that the rent was not less than the distress. And in *Scott* v. *Waithman* (*l*), where Abbott, C. J., said, "As the verdict in the replevin suit was merely for a return of the goods, the jury could not in their verdict exceed the value of the goods," it does not appear whether the goods were greater or less in value than the rent.

In no case could either sureties or sheriff be liable for rent which accrued after the distress (*m*).

Damages against sheriff.

The rules thus settled equally applied where the action was against the sheriff for not having taken a bond at all, or an invalid one, or one with insufficient sureties. In such a case the rent due, and the expenses of the distress, were held to be a proper amount of damages (*n*). In that case it would appear, that the value of the goods was greater than the amount of the rent; and that no proceedings in replevin had been carried on, so as to raise a claim for costs. The costs of proceedings against the sureties might be recovered against the sheriff in this form of action, even though no notice of the intention to proceed against them had been given him; provided such costs did not, together with other claims, exceed the penalty (*o*). In *Baker* v. *Garratt*, the Court seemed to think, that if due notice of the intention to sue had been given, such costs might be recoverable, even beyond the

(*j*) *Hunt* v. *Round*, 2 Dowl. 558; *Miers* v. *Lockwood*, 9 Dowl. 975.
(*k*) 1 Y. & J. 285.
(*l*) 3 Stark. 168.
(*m*) *Ward* v. *Henley*, 1 Y. & J. 285.
(*n*) *Edmonds* v. *Challis*, 7 C. B. 413.
(*o*) *Baker* v. *Garratt*, 3 Bingh. 56; *Plumer* v. *Brisco*, 11 Q. B. 46.

penalty; because the sheriff might have prevented the expense by paying all he was liable to pay under the sureties' bond. They distinguished such a case of expenses, wholly incurred through his default, from that of costs of replevin suit, for which he was not liable to a greater amount than the penalty (*p*); because the legislature presumed that these would be covered by double the value of the goods, and the amount so incurred was not within his control.

When bond is lost.

On the same principle, where the sheriff had lost the replevin bond, he was liable in an action on the case at the suit of the defendant in replevin, to the amount of damage to which the sureties would have been liable, or to the amount of the penalty of the bond, whichever was less (*q*).

Damages for breach of other duties.

The principle that where the sheriff has been in fault, the plaintiff is entitled to be placed in the same position by means of damages, as if the defendant had done his duty, is maintained in numerous other cases; for instance, in actions for delay in executing a writ of arrest (*r*); in selling under a fi. fa. (*s*); in returning the writ (*t*); for a false return (*u*); for not levying (*v*). In all these the damages are measured not by the amount of the debt, but by the amount which could or would have been recovered, if the breach of duty had not taken place (*x*). And if the sheriff return *nulla bona* to a writ of fi. fa., and the creditor knows of goods belonging to his debtor, he need not sue forth a second writ of fi. fa., but may, in an action for a false return, recover the value of the goods which the sheriff ought to have taken (*y*).

When it is necessary to prove actual damage.

There is a difference to be observed in these actions, viz. that in those, the whole gist of which is pecuniary damage,

(*p*) *Evans* v. *Brander*, 2 H. Bl. 547.
(*q*) *Perreau* v. *Bevan*, 5 B. & C. 284.
(*r*) *Clifton* v. *Hooper*, 6 Q. B. 468.
(*s*) *Aireton* v. *Davis*, 9 Bingh. 740; *Bales* v. *Wingfield*, 4 Q. B. 580 n.
(*t*) *R.* v. *Sheriff of Essex*, 1 M. & W. 720.
(*u*) *Crowder* v. *Long*, 8 B. & C. 598; *Heenan* v. *Evans*, 3 M. & Gr. 398.
(*v*) *Augustien* v. *Challis*, 1 Exch. 279; *Mullet* v. *Challis*, 16 Q. B. 239.
[(*x*) And all the probabilities of the case must be looked at, as for example, whether or not, if the execution had been levied, the plaintiff would have got any benefit from it, the other creditors of the execution debtor having been in a position to make him bankrupt; *Hobson* v. *Thellusson*, 8 B. & S. 476; L. R. 2 Q. B. 642; 36 L. J. Q. B. 302.]
(*y*) *Per* Cur. *Arden* v. *Goodacre*, 11 C. B., at p. 377; 20 L. J. C. P. 184. [*Primâ facie*, the measure of damage is the value of the goods which might have been and were not levied; *Hobson* v. *Thellusson*, *supra*.]

some such damage must be proved, or the action will fail. But in others, there is an injury to a right, even independent of actual loss; and the fact of loss being negatived, merely makes the damages nominal. Thus in an action for a false return (*z*); for not arresting on mesne process (*a*); or for permitting a debtor arrested on mesne process to escape (*b*); a plea negativing any damage is good as a bar, and proof of absence of loss entitles the defendant to a verdict (*c*). In all these cases, the truth of the return, or the detention of the debtor, is only of importance to the plaintiff as contributing to some ulterior result. If no such result could have been produced, or has been affected by it, there is no ground of action. But the case of an escape on final process is different. The creditor, "when he is ascertained to be such by a judgment, and he has charged the debtor, has a right to the body of his debtor every hour till the debt is paid" (*d*). This is itself the end, not the means. Consequently, a right of action for nominal damages arises on any escape, for however short a time, even though no pecuniary damage arises (*e*); or on any delay in arresting him (*f*). It would appear in all cases in which damage is necessary to maintain the action, that proof of the breach of duty will lay upon the defendant the onus of showing that no damage ensued; but to entitle plaintiff to substantial damage, specific evidence of loss must be given (*g*).

Onus of proving damage.

Cases of actions for escape after arrest on mesne process, or neglect to execute such arrest, [became of rare occurrence after] arrest on mesne process was almost done away with by 1 & 2 Vict. c. 110, s. 3. [It is now abolished by The Debtors'

(*z*) *Wylie* v. *Birch*, 4 Q. B. 566; [*Levy* v. *Hale*, 29 L. J. C. P. 127; *Stimson* v. *Farnham*, L. R. 7 Q. B. 175; 41 L. J. Q. B. 52.]

(*a*) *Curling* v. *Evans*, 2 M. & G. 349.

(*b*) *Williams* v. *Mostyn*, 4 M. & W. 145; *Lewis* v. *Morland*, 2 B. & A. 56—64; *Planck* v. *Anderson*, 5 T. R. 37; overruling *Barker* v. *Green*, 2 Bingh. 317.

[(*c*) So where the action was against the sheriff for selling the reversionary interest of the plaintiff in goods in the possession of an execution debtor; *Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J. Ex. 362. See also *Lancashire Waggon Company* v. *FitzHugh*, 6 H. & N. 502; 30 L. J. Ex. 231.]

(*d*) *Per* Buller, J., *Planck* v. *Anderson*, 5 T. R. 40.

(*e*) *Williams* v. *Mostyn*, 4 M. & W. 153.

(*f*) *Clifton* v. *Hooper*, 6 Q. B. 468.

(*g*) *Bales* v. *Wingfield*, 4 Q. B. 580, n.; *Wylie* v. *Birch*, 4 Q. B. 566, 578; *Scott* v. *Henley*, 1 M. & Rob. 227.

Act, 1869, 32 & 33 Vict. c. 62, s. 6. But analogous actions may still arise, for it would seem that an action will lie against the sheriff for disobeying an order for arrest made by a judge under this last act (*h*). Such orders may be made under certain circumstances before final judgment where the defendant is about to quit England, the arrest being for a period not exceeding six months, terminable on the defendant's giving security, in ordinary actions, that he will not go out of England without the leave of the Court, in penal actions, that the sum recovered in the action shall be paid or the defendant rendered to prison (*i*). Arrest on final process is also abolished, except in a few specified cases; and if those excepted cases still give rise to actions for not arresting or for escape, the calculation of damages will be complicated by the consideration that the imprisonment could in no case be for a longer period than a year (*k*). Under s. 5, in some cases judgment debtors may be committed to prison for periods not exceeding six weeks or until payment of the sum due. It will be difficult for a jury to estimate satisfactorily in such cases the value of the custody of the debtor.]

Actions for escape.

Formerly by statute Westminster 2 (*l*), and 1 Rich. II. c. 12, an action of debt could be maintained against the sheriff upon an escape, to recover the sum for which the debtor had been charged in execution, and upon this action the creditor could not recover less than the whole sum due, and the costs of the execution (*m*). This action, however, has been taken away by 5 & 6 Vict. c. 98, s. 31, and the creditor is left to his old remedy at common law by action on the case for damages. In a recent case the law as to the assessment of damage was laid down by the Court of C. B. as follows: "The true measure of damage is the value of the custody of the debtor at the time of the escape, and no deduction ought to be made on account of anything which the plaintiff might have obtained by diligence after the escape. If the execution debtor had not the means of satisfying the judgment at the

Must be in case.

Measure of damages.

[(*h*) See Roscoe's Nisi Prius, 1118, 12th ed.]

[(*i*) 32 & 33 Vict. c. 62, s. 5. The judge's orders are carried into effect by the sheriff; R. G. M. T. 1869.]

[(*k*) S. 4.]

(*l*) 13 Ed. I. c. 11.

(*m*) *Bonafous* v. *Walker*, 2 T. R. 126; *Hawkins* v. *Plomer*, 2 Bl. 1048.

moment of the escape, the plaintiff will have lost only the security of the debtor's body, and the damages may be small. If the execution debtor had the means of satisfying the judgment at the moment of the escape, and has wasted those means since the escape, it is plain that the plaintiff has lost the chance of obtaining satisfaction of his judgment through the sheriff's neglect, and the jury would be justified in giving the full amount of the execution. Where the execution debtor has the means of paying the debt at the moment of the escape, and still continues notoriously in solvent circumstances, the value of the custody would be the amount of the debt, and the plaintiff would be entitled to recover substantial damages. If the laches of the plaintiff could be used to mitigate the damages against the sheriff, the plaintiff would be compelled, in every case, to issue a fresh writ, and incur expense to relieve himself to some extent from the consequence of the sheriff's negligence; but if such were the plaintiff's duty, we should find some trace of the sheriff's liability to repay such expenses where the debtor was not recaptured upon the second writ, and the plaintiff's exertions were unavailing to realise the amount of his judgment. There may, however, be circumstances under which the plaintiff's conduct would materially affect the damages. For instance, if he has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from retaking the debtor (*n*).

Of course an action will lie by the creditor against the sheriff to recover the money levied by him under an execution, and the damages will be the whole amount so levied. But where the action has been commenced without a demand of the sum, the Court will stay proceedings upon payment of the amount *without* costs (*o*).

Actions by the debtor.

II. Actions against the sheriff by the debtor or his representatives, are generally for a seizure of his goods or person

(*n*) *Arden* v. *Goodacre*, 11 C. B. 371; 20 L. J. C. P. 184. [So *Moore* v. *Moore*, 25 Beav. 8; 27 L. J. Ch. 385; *Hemming* v. *Hale*, 7 C. B. N. S. 487; 29 L. J. C. P. 137. Not only the debtor's own resources are to be considered, but all reasonable probabilities, founded on his position in life, that the debt would have been discharged; *Macrae* v. *Clarke*, L. R. 1 C. P. 403; 35 L. J. C. P. 247.]

(*o*) *Jefferies* v. *Sheppard*, 3 B. & A. 696.

under illegal circumstances, or for an improper treatment of the property so taken. So far as these actions differ from similar proceedings against any other wrong-doer, they have been treated of in a previous chapter (*p*).

Extortion.

Another species of wrong, viz., extortion by exacting too large fees, has been provided for by statute; 29 Eliz. c. 4, s. 1, enacts, that if the sheriff or his officers extort more than the poundage fees allowed by that act, they shall lose and forfeit to the party grieved his treble damages This means three times the full amount found by the jury (*q*). This statute is not repealed by 1 Vict. c. 55, which permits the sheriffs to take certain additional fees, if previously sanctioned by the judges, and makes the officer exacting more punishable as for a contempt. The effect of the latter act is to exempt the taking of the fees allowed by the judges under it from the operation of the penal clause in the statute of Eliz., leaving that statute in other respects in full operation. Consequently all that is taken by the sheriff or his officer beyond what is warranted by the exemption given by the statute of Vict. is, if it amounts to more than the poundage, an excess under the statute of Eliz., and renders the officer taking such excess liable to an action for the penalty given by that statute (*r*).

Form of declaration.

The declaration should show how much was taken lawfully, and how much unlawfully, stating the excess on each fee (*s*). But where the illegality consists in exacting poundage where no levy at all was made, it is not necessary to negative all the acts which would have constituted a levy (*t*).

Where the misconduct of the sheriff has forced the party injured to take legal proceedings, only the taxed costs of such proceedings can be recovered back from him, and not the extra costs paid to the plaintiff's attorney (*u*).

Actions against attornies for negligence.

5. Damages in actions against attornies for neglect of their duty are governed by exactly the same principles as those laid down in the case of sheriffs. The plaintiff is entitled to be

(*p*) *Ante*, p. 314.
(*q*) *Buckle* v. *Bewes*, 4 B. & C. 154.
(*r*) *Per* Cur. *Wrightup* v. *Greenacre*, 10 Q. B. 1; *Pilkington* v. *Cooke*, 16 M. & W. 615.
(*s*) *Usher* v. *Walters*, 4 Q. B. 553: *Berton* v. *Lawrence*, 5 Exch. 816.
(*t*) *Holmes* v. *Sparkes*, 12 C. B. 242.
(*u*) *Jenkins* v. *Biddulph*, 4 Bingh. 160.

placed in the same position as if the attorney had done his duty. But he is entitled to no more. Therefore where no diligence could have been effectual, as where the client had no ground of action or defence, the attorney cannot be liable for negligence, unless it has caused loss independent of the necessary result of the suit, or other proceeding (*x*). It lies upon the defendant, however, to establish this defence affirmatively, and the fact that the plaintiff has suffered no actual injury is no bar to the action, if otherwise maintainable. He is still entitled to nominal damages (*y*). The amount of damages is a question for the jury (*z*), and depends upon the amount of loss which the plaintiff has suffered (*a*), *or is likely to suffer from the act*, taking all the circumstances of the case into consideration. The latter part is clear from the case of *Howell* v. *Young* (*b*), which decides that the Statute of Limitations runs from the act of negligence, not from the time that an injury accrues; such injury is merely consequential damage, not a fresh cause of action; the damages then in the original action must cover all the loss that can ever arise, because no such loss can afterwards be compensated. Where the action was for negligence in not procuring the release of the plaintiff, an imprisoned debtor, under 48 Geo. II. c. 123, by reason of which he was detained in prison from the 11th of January till the 19th of March, when he was discharged by consent of the detaining creditor; the jury were told that in estimating the damages they might take into consideration that, as the plaintiff was finally released by consent, he gained the advantage of having his goods no longer liable, which they would have been if he had been discharged by the Court, as he had himself desired (*c*). With submission, how-

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(*x*) *Lee* v. *Ayrton*, Peake, 119; *Aitcheson* v. *Madock*, Pea. 162; [*Harrington* v. *Binns*, 3 F. & F. 942.]

(*y*) *Godefroy* v. *Jay*, 7 Bingh. 413. [So where the attorney compromises a suit against the express instructions of his client, though the compromise be for the client's benefit, at least nominal damages may be recovered by the client in an action against the attorney; *Fray* v. *Voules*, 1 E. & E. 839; 28 L. J. Q. B. 232. And see *Butler* v. *Knight*, L. R. 2 Ex. 109; 36 L. J. Ex. 66.]

(*z*) *Russell* v. *Palmer*, 2 Wils. 325; *Pitt* v. *Yalden*, 4 Burr. 2061.

(*a*) *Stannard* v. *Ullithorne*, 10 Bingh. 491; *Godefroy* v. *Jay*, 7 Bingh. 413; *Burdon* v. *Webb*, 2 Esp. 527.

(*b*) 5 B. & C. 259, 266.

(*c*) *Shilcock* v. *Passman*, 7 C. & P. 289—293.

ever, it may be doubted whether the latter circumstance could fairly be taken into consideration. If it had been a necessary result of the defendant's delay that a prolonged period of imprisonment should be followed by an absolute discharge from all liability, then, in estimating the damages due for such negligence, all its consequences would, of course, be properly included. But in this case, the final release by consent was in no way a result of the defendant's act. If some friend, compassionating the plaintiff on account of his continued imprisonment, had paid off the debt, surely this could not have been considered in assessing the damages. Yet it might have been equally argued, that if the plaintiff had got out at the time and on the terms which he had wished, the sympathies of his friend would never have been excited in his favour.

Where record is withdrawn.

Where, in consequence of the attorney's negligence in not attending himself with the witnesses, the plaintiff's counsel is obliged to withdraw the record, the attorney is, of course, liable to the expenses so incurred (*d*). And where a larger sum was given as damages, the Court considered them excessive, and ordered them to be reduced, or a new trial granted (*e*).

When cause is taken as undefended.

Where, however, the attorney is acting for the defendant in a cause, and through his negligence it is taken as undefended, and a verdict goes against his client in consequence, the jury may of course give as damages the whole value of the subject-matter of action (*f*). In such a case the Court, in one instance, granted a new trial, and ordered the defendant's attorney to pay all costs out of his own pocket as between attorney and client (*g*). But in similar cases the Court have since refused the indulgence (*h*). Still in cases of very great importance, as for instance relating to land, where the interests of others would be bound by the verdict, the Court would probably even now grant a new trial on such terms (*i*). If such an arrangement had been made, it would seem that the

(*d*) See as to these, *post*, p. 362.
(*e*) *Hawkins* v. *Harwood*, 4 Exch. 503.
(*f*) *Hoby* v. *Built*, 3 B. & Ad. 350.
(*g*) *De Roufigny* v. *Peale*, 3 Taunt. 484.
(*h*) *Gwilt* v. *Crawley*, 8 Bingh. 144; *Watson* v. *Reeve*, 5 B. N. C. 112; *Nash* v. *Swinburn*, 4 Sco. N. R. 326.
(*i*) *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 91; *Lowden* v. *Hierons*, 2 Moore, 102.

damages ought to be nominal, or at least should only extend to the actual loss suffered by delay, if any.

6. Actions against witnesses.

Where a witness, who has received a proper *subpœna*, and who has had his expenses tendered, fails to attend at the trial, the party summoning him has his choice of proceeding against him by attachment, or by action on the case, or he may sue for the penalty given by 5 Eliz. c. 9, s. 12. With the former course we have nothing to do. The two latter require a few words.

The proper course for a party to take when an important witness is absent, is to withdraw the record if he be the plaintiff, or apply for a postponement of the trial if he be the defendant. This leaves him his remedy against the witness, for it is now settled that in order to maintain an action against the latter for non-attendance, it is not necessary that the cause should have been called on, or the jury sworn (*k*). It also saves him all risk which might result from a trial on imperfect evidence. Consequently, any additional expense or loss caused by going to trial will be his own fault, and not the necessary result of the witness's absence.

Damages in an action are the costs of withdrawing the record.

The damages in an action by the original plaintiff, who was forced to withdraw the record, consist of the expense he was put to in so doing, viz., the costs he incurred by going down to a fruitless trial, and the costs he became liable to pay the opposite party in consequence of the withdrawal of the record (*l*). The damages would be just the same where the witness was the defendant's, because he may obtain the postponement of the trial, upon paying the costs which the opposite party has been put to in preparing for trial, which are the same as the costs of withdrawing the record (*m*).

Plaintiff must prove damage.

This action cannot be supported without evidence of some damage resulting from the defendant's neglect. Such damage cannot, however, be negatived merely by showing that the plaintiff had no good cause of action. The defendant's evidence might have entitled him to succeed in some particular

(*k*) *Mullett* v. *Hunt*, 1 C. & M. 752; *Lamont* v. *Crook*, 6 M. & W. 615.
(*l*) *Needham* v. *Fraser*, 1 C. B. 815.
(*m*) *Brown* v. *Murray*, 4 D. & R. 830; *Attorney-General* v. *Hull*, 2 Dowl. P. C. 111; *Walker* v. *Lane*, 3 Dowl. P. C. 504.

issues, and the loss of costs upon these is a sufficient injury, though he could not have succeeded upon the whole record (*n*).

Action for penalty.

Statute 5 Eliz. c. 9, s. 12, enacts, that a witness making default after due process served, and tender of expenses, shall forfeit 10*l.*, and yield such further recompense to the party grieved, as by the discretion of the Judge of the Court, out of which the said process issues, shall be awarded, according to the loss and hindrance that the party shall sustain by reason of his non-appearance. These damages must be assessed by the Court at Westminster, and not by a jury, or Judge at Nisi Prius, and an action will lie on the assessment (*o*). [An action will not lie against a witness for false and defamatory statements concerning the plaintiff made in the due course of a judicial proceeding, though they be made maliciously and without reasonable and probable cause, and have caused damage to the plaintiff (*p*).]

7. Defamation.

Damages in this action are so entirely at the discretion of the jury that no rule as to their amount can be laid down. Some principles, however, may be stated as to the nature of the evidence which may be used, and the object to which it may be applied.

Evidence of malice;

One of the principal elements in estimating the damages is the malice of the defendant, and much difficulty often arises with regard to evidence of subsequent words or writings adduced in proof of this.

other slander.

It has been long established that other words or writings, not the subject of the present action, might be given in evidence to explain either the meaning or motive of the defamatory matter on which the action was founded (*q*). And that whether the publications, &c. offered in evidence were before those complained of (*r*), or after issue joined in the

(*n*) *Couling* v. *Coxe*, 6 C. B. 703, 719. [To justify substantial damages, it is not necessary to show that the witness's testimony would to a certainty have ensured a successful result; a probability of success is sufficient; *Yeatman* v. *Dempsey*, 7 C. B. N. S. 628; 29 L. J. C. P. 177; affirmed, 9 C. B. N. S. 881.]

(*o*) *Pearson* v. *Iles*, 2 Dougl. 561.

(*p*) [*Revis* v. *Smith*, 25 L. J. C. P. 195; 18 C. B. 126; and see *per* Erle, C. J., *Barber* v. *Lesiter*, 29 L. J. C. P. at p. 165; 7 C. B. N. S. at p. 188.]

(*q*) *Simpson* v. *Robinson*, 12 Q. B. 511; *Plunkett* v. *Cobbett*, 5 Esp. 136; *Camfield* v. *Bird*, 3 C. & K. 56.

(*r*) *Burrett* v. *Long*, 3 H. L. Ca. 395.

action (*s*); and even though the writing or publication is itself the subject of a distinct count in the same action (*t*). But it has been held that such evidence must be in some way connected with the libel in question (*u*). It may be doubted, however, whether this distinction is a very reasonable one. If the object of the evidence is to prove malice by showing the feelings with which the defendant was actuated towards the plaintiff, this would be proved much more strongly by showing that he had seized a dozen opportunities of maligning him on different subjects, than that he had a dozen times repeated the original libel. Formerly it was thought that no such evidence could be received when the words, &c. so offered were themselves actionable (*x*). But this distinction was early denied by Lords Kenyon and Ellenborough (*y*), and has been finally overthrown (*z*). So too it was once laid down that such evidence was only admissible where the language complained of was ambiguous; but where it was clear and undisputed, it was not so (*a*). But this distinction, though quite just, if the only object of the evidence were to explain the meaning of the libel, obviously fails when the evidence is adduced to show the motives with which it was published. These may be quite independent of the meaning of the libel, of which there may be no doubt. Accordingly, this distinction too has been overruled by *Pearson* v. *Lemaitre*, where Tindal, C. J., lays down the correct rule to be, "that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter, but if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it; and if such evidence is offered merely for the purpose of

(*s*) *Macleod* v. *Wakley*, 3 C. & P. 311. [If there has been a considerable interval, the jury should be directed to consider whether the subsequent expressions might not have referred to something which had happened after the libel; *Hemmings* v. *Gasson*, E. B. & E. 346; 27 L. J. Q. B. 252.]

(*t*) *Delegall* v. *Highley*, 8 C. & P. 444.

(*u*) *Finnerty* v. *Tipper*, 2 Camp. 72.

(*x*) *Mead* v. *Daubigny*, Peake, 125; *Cook* v. *Field*, 3 Esp. 133; *Defries* v. *Davis*, 7 C. & P. 113.

(*y*) *Lee* v. *Huson*, Peake, 166; *Rustell* v. *Macquister*, 1 Camp. 49, n.

(*z*) *Pearson* v. *Lemaitre*, 5 M. & Gr. 700.

(*a*) *Stuart* v. *Lovell*, 2 Stark. 93; *Pearce* v. *Ornsby*, 1 M. & Rob. 455; *Symmons* v. *Blake*, *ibid.*, 477.

obtaining damages for such subsequent injury, it will be properly rejected (*b*).

Persisting in the charge.

On the same principle, the fact that the defendant has persisted in the accusation and refused to apologise, and that he has put a plea of justification on the record, may be taken into consideration as evidence of malice to heighten the damage (*c*). But the latter circumstance cannot be used as evidence of express malice, in answer to another plea raising the defence of a privileged communication; though if that plea were found for the plaintiff, it would be an aggravation of the damage (*d*). Even where the publication is admitted on the pleadings, the plaintiff is entitled to show the manner of it, with a view to damages (*e*).

General evidence of character to prove malice.

General evidence of good character cannot be given in aggravation of damage, except to rebut evidence offered by the other side; for till then the presumption of law is in the plaintiff's favour, and the evidence would (in theory at all events) be without an object (*f*).

When the libel consists of an accusation imputing incompetency in a particular transaction, evidence cannot be offered of general competency on other occasions. This could only be admissible to show malice, by disproving the charge. But a person may have shown himself quite incompetent on one occasion, and quite the reverse on others (*g*). The contrary rule prevails where the accusation is as general as the evidence offered to rebut it. Accordingly where the defendant had written of the plaintiff, who had acted as governess in the defendant's family, "I parted with her on account of her incompetency, and not being lady-like and good-tempered;" general evidence in contradiction of the statement was received. Lord Denman said, "Malice may be established by

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(*b*) 5 M. & G. at p. 719. [Omitting to give this caution is not misdirection; *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227.]

(*c*) *Simpson* v. *Robinson*, 12 Q. B. 511. [Even the language of counsel in Court, if instructed to persist in the charge, may aggravate the damages; *ib.*, and see *Darby* v. *Ouseley*, *per* Pollock, C. B., 25 L. J. Ex. at pp. 230, 233; *Risk Allah Bey* v. *Whitehurst*, 18 L. T. N. S. 615, *per* Cockburn, C. J., at *nisi prius*.]

(*d*) *Wilson* v. *Robinson*, 7 Q. B. 68.

(*e*) *Vines* v. *Serell*, 7 C. & P. 163.

(*f*) *Cornwall* v. *Richardson*, Ry. & M. 305; *Guy* v. *Gregory*, 9 C. & P. 587.

(*g*) *Brine* v. *Bazalgette*, 3 Exch. 692.

various proofs; one may be that the statement is false to the knowledge of the party making it" (*h*).

Evidence of the circulation of the libel.

Where it appears that many copies of a newspaper containing a libel have been put into circulation, this will be admissible to aggravate the damages on the ground of malice, if the defendant can be expressly connected with the circulation; if he cannot, no presumption of malice can be drawn, but the fact will still be evidence to show the extent of injury done. This was so ruled in a case where the defendant was the publisher of a newspaper, which was industriously circulated in a particular neighbourhood, and sent gratuitously to several non-subscribers, but not by the defendant (*i*). The same rule would clearly apply to a person not the publisher, if he puts his libel into a shape which would ensure its circulation, as into a newspaper. Of course he would not be responsible for its republication by a third person, in a way which he could not have anticipated; as, for instance, if a private letter containing a libel was printed by the receiver without his knowledge (*k*).

When evidence of malice is inadmissible.

There may, however, be cases in which, from the form of action, evidence of malice would be inadmissible. Accordingly in an action against the publisher of a magazine, no evidence can be given of the malice of the writer, who is a different person, and for whose motives the editor cannot be liable, though he is responsible by law for his acts (*l*). And so the position of the plaintiffs may exclude evidence which would otherwise be allowable. In a joint action by partners for a libel, no damages can be given for the injury to their feelings, as the only basis of the joint action is the injury to their joint trade (*m*). And in a joint action by husband and wife for a libel on the wife, no special damages can be recovered *on the joint count*, because any such is damage solely accruing to the husband (*n*). But now in any action brought by a man and

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(*h*) *Fountain* v. *Boodle*, 3 Q. B. 5; [so *Harrison* v. *Bush*, 5 E. & B., at p. 363, *et seq.*; 25 L. J. Q. B. 99.]

(*i*) *Gathercole* v. *Miall*, 15 M. & W. 319.

(*k*) See *Ward* v. *Weeks*, 7 Bingh. 211, *et post.*

(*l*) *Robertson* v. *Wylde*, 2 M. & Rob. 101.

(*m*) *Haythorn* v. *Lawson*, 3 C. & P. 196; [*Lefanu* v. *Malcolmson*, 8 Ir. L. R. 418.]

(*n*) *Dengate* v. *Gardiner*, 4 M. & W. 5.

his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, the husband may add claims in his own right (*o*).

Substantial damages may be given without proof of actual injury.

Where the cause of action is proved or admitted, the jury are not limited to nominal damages, though no evidence is given on the part of the plaintiff (*p*). In a recent case the action was for a newspaper libel published more than seventeen years ago. In bar of the statute it was proved that a single copy had been sold by defendant to plaintiff's agent. It was held that the judge was not bound to tell the jury that they ought to limit the damages to the injury which they might believe the single publication had occasioned (*q*). In the particular case there were other counts for other libels more or less connected with it, which would have made the separate assessment of damages very difficult; but on principle the decision is obviously correct.

Future damage.

Where the words are actionable without special damage, the jury may take into consideration not only the injury that has arisen, but that which may arise from the slander; because such fresh injury would constitute no fresh ground of action (*r*). But it is said by North, C. J., in the same case (*s*), that if the words are not in themselves actionable, the jury in computing damages ought only to consider the damage which is specially alleged and proved; because if any damage be at a future time sustained, a subsequent action will lie for it. And so where evidence of special damage, subsequent to the commencement of the suit, was admitted by consent, Tindal, C. J., said, "By permitting this evidence to be given, the defendant may possibly have escaped having a second action brought against him" (*t*). But this is opposed to the authority of a distinguished judge, who lays it down, that where a plaintiff has once recovered damages he cannot afterwards bring an action for any other special damage, whether the words be in themselves actionable or not (*u*).

(*o*) 15 & 16 Vict. c. 76, s. 40.
(*p*) *Tripp* v. *Thomas*, 3 B. & C. 427.
(*q*) *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185.
(*r*) *Lord Townshend* v. *Hughes*, 2 Mod. 150; *Ingram* v. *Lawson*, 6 Bingh. N. C. 213; *Gregory* v. *Williams*, 1 C. & K. 568.
(*s*) *Lord Townshend* v. *Hughes*, *supra*.
(*t*) *Goslin* v. *Corry*, 7 M. & G. 342, 345.
(*u*) Bull, N. P. 7; citing *Fitter* v. *Veal*, Ca. K. B. 542.

Evidence of specific injury after action brought.

Of course special damage, laid as such, must have accrued before action; but a different question arises, whether a specific injury after action may be given in evidence to enable the jury to estimate the amount of general damage? An action was brought by a shipowner for a libel, which stated that his ship, then advertised to sail to the East Indies, was not seaworthy, and was purchased by Jews to take out convicts. No special damage was laid. The action was commenced three days after the libel was published. Evidence was admitted of the average profits of a voyage to the East Indies, and that the first voyage after the libel, the plaintiff's profits were nearly 1500*l.* below the average. It was held that the evidence was rightly received. The jury must have some mode of estimating the damages, and they could not be in a condition to do so, unless they knew something of the plaintiff's business, and of the general return of his voyages (*x*). The same principle was applied where the action was for a description of the plaintiff in the Hue and Cry, in consequence of which he was arrested. The arrest, which was laid specially, took place after action brought. Evidence of it was allowed by consent of defendant's counsel, who then objected that the judge ought to have excluded it from the minds of the jury in assessing the damages. It was held that the judge's charge was right, as he did not tell the jury that they were at liberty to give damages for the arrest, which took place after action brought, but that they might view it as a confirmation of the plaintiff's apprehension that an arrest would be the probable consequence of the libel (*y*). This was obviously the only way in which the evidence could be used, but it seems to have been assumed throughout that it was not strictly admissible at all. Now it is plain, that in estimating damages the jury must be greatly influenced by the probability that an arrest would take place, and on the principle of *Ingram* v. *Lawson*, evidence that it had taken place, even after action, was surely admissible. Possibly the difficulty in this case arose from the fact, that that very arrest was laid as special damage, and to prove that allegation it plainly was inadmissible.

(*x*) *Ingram* v. *Lawson*, 6 Bingh. N. C. 212.
(*y*) *Goslin* v. *Corry*, 7 M. & Gr. 342.

Proof of general injury.

Where words are in themselves actionable, no special damage need be laid or proved; the law presuming that the uttering of the words, or the publishing of the libel, have in themselves a natural and necessary tendency to injure the plaintiff (*z*). From this the curious inference seems to be drawn, that because the law assumes that a general injury will follow, you cannot prove that a general injury has followed. In an action for a libel against a trader, special damage was laid. Plaintiff's counsel proposed to rely only on general injury, and to ask whether there had not been a general loss of business since the libel. Tindal, C. J., said, "No, that would be so very hard against the party. You set out with that, you see. The law gives it you as a bonus. If you want specific damages you must give specific evidence" (*a*). Where, however, the action was for a libel on an actress, in consequence of which she would not sing, and the declaration alleged as damages the loss of several performances, Lord Kenyon ruled that the box-keeper might be asked generally, whether the receipts of the house had not diminished from the time Madame Mara had declined to sing? but that to ask if particular persons had not in consequence given up their boxes, was specific damage and inadmissible (*b*). Similar evidence was received in the case of *Ingram* v. *Lawson* (*c*). There, however, it seems to have been admitted, not with a view to show what the plaintiff's loss had been, but what the general nature of his business and profits was. For it will be remarked that though the evidence showed a falling off of 1500*l.*, the jury only found a verdict for 900*l.* In *Rose* v. *Groves*, Cresswell, J., took a distinction between particular and special damage, saying, "In an action for slandering a man in his trade, where the declaration alleges that he thereby lost his trade, he may show a general damage to his trade, though he cannot give evidence of particular instances" (*d*). There seems a difficulty with regard to the admission of the evidence, as to the mode of connecting the slander with the falling off. On the other

(*z*) *Malachy* v. *Soper*, 3 B. N. C. 382.
(*a*) *Delegall* v. *Highley*, 8 C. & P. 448.
(*b*) *Ashley* v. *Harrison*, 1 Esp. 48.
(*c*) *Ante*, p. 368.
(*d*) 5 M. & Gr., at p. 618. [So *Evans* v. *Harries*, 1 H. & N. 251; *post*, p. 370.]

hand, there is an obvious injustice in excluding what, in the mass of cases, must be the only evidence of damage really procurable.

Special damage must be laid.

Special damage must be laid and *proved*, where the words are not actionable without it. In this case the special damage is the gist of the action (*e*).

Even though the words are in themselves actionable, no evidence of any specific loss sustained in consequence of them can be adduced, unless laid in the declaration (*f*). It is sufficient, however, to state the special damage with as much certainty as the case will admit of. [It has been said that] if a trader brings an action for slander, by which he lost his customers, their names must be set out specially, that the defendant may meet the charge if it is false; and [that] where this is not done, general evidence of loss of customers cannot be received (*g*). But a clergyman laying as special damage the loss of his congregation, is not required to state their names, on account of the supposed impossibility of so doing (*h*). The principle is clear enough, but the distinction between the two cases seems rather fine. [And recently, in an action for slander of the plaintiff in his business of an innkeeper, it was held sufficient to allege and prove as special damage a general loss of custom, without stating the names of customers (*i*).]

Special damage must be the result of defendant's own acts.

As to special damage, [which must be the loss of some material temporal advantage (*k*),] that only which is the natural and fair result of the words spoken can be laid, or proved. The application of this rule is not so very easy. One point is quite clear, that no damage can be recovered for,

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(*e*) See the Text Bks., Selw. N. P. 10th ed. 1248; [12th ed. 1269]; Com. Dig. Action upon the Case for Defamation, D. 30. See also *Malachy* v. *Soper*, 3 B. N. C. 371; *Ayre* v. *Craven*, 2 A. & E. 2; *Evans* v. *Harlow*, 5 Q. B. 624; *Wilby* v. *Elston*, 8 C. B. 142; *Hopwood* v. *Thorn*, *ibid.*, 293; [*Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125; where it was held that general damages for loss of business, which might have resulted from a repetition of the slander, could not be recovered.]

(*f*) *Geare* v. *Britton*, B. N. P. 7; *Hatheway* v. *Newman*, Selw. N. P. 1248.

(*g*) *Hartley* v. *Herring*, 8 T. R. 133; *Waterhouse* v. *Gill*, Selw. N. P. 1248, 10th ed. See, however, *per* Cresswell, J., *ante*, p. 369.

(*h*) *Hartley* v. *Herring*, 8 T. R. 130.

[(*i*) *Evans* v. *Harries*, 1 H. & N. 251; and see *M'Loughlin* v. *Welsh*, 10 Ir. L. R. 19.]

[(*k*) *Roberts and Wife* v. *Roberts*, 5 B. & S. 384; 33 L. J. Q. B. 249.]

which is the result, not of the original slander by the defendant, but of the repetition of that slander by some third person. In such a case, the immediate cause of the plaintiff's damage arises from the voluntary act of a free agent over whom the defendant has no control, and for whose acts he is not answerable (*l*). But where the words are used under circumstances which render it certain that they will be repeated, and they are repeated by persons whose duty it is to report them, injury accruing from such report is it seems admissible; as where a police constable was dismissed in consequence of language addressed to him by a police magistrate in trying a cause, which was reported in due course to the commissioners (*m*).

When the act of a third party will be good special damage.

It was once thought that damage resulting from the act of a third party, though caused by the language of the defendant, would not be actionable if it was in itself a ground of action by the plaintiff against such third party (*n*). This doctrine, however, was long doubted (*o*), and is now finally overruled (*p*). In practice the same result will probably be reached in many cases, by aid of the doctrine that damages must not be *too remote*. Where the act of the third party is plainly rash and illegal, it will perhaps be held not to be the natural result of the defendant's words. To use Lord Ellenborough's illustration (*q*), "The defendant would be no more answerable for it, than if, in consequence of the words, other persons had afterwards assembled and seized plaintiff and thrown him into a horsepond, by way of punishment for his supposed transgression" (*r*).

Where an actual injury has followed the slander, it is no answer to show that the third person would have probably

(*l*) *Ward* v. *Weeks*, 7 Bingh. 211; *Vicars* v. *Wilcocks*, 8 East, 1; 2 Smith's L. C. 487, 6th ed.; *Tunnicliffe* v. *Moss*, 3 C. & K. 83; [*Dixon* v. *Smith*, 5 H. & N. 450; 29 L. J. Ex. 125; *Bateman* v. *Lyall*, 7 C. B. N. S. 638.]

(*m*) *Kendillon* v. *Maltby*, Car. & M. 402; [*Derry* v. *Handley*, 16 L. T. N. S. 263, Q. B. It is not the duty of a wife to report to her husband slanderous abuse of herself; *Parkins* v. *Scott*, 1 H. & C. 153; 31 L. J. Ex. 331.]

(*n*) *Vicars* v. *Wilcocks*, 8 East, 1; 2 Smith's L. C. 487, 6th ed.; *Morris* v. *Langdale*, 2 B. & P. 284, 289.

(*o*) *Green* v. *Button*, 2 C. M. & R. 707, 2 Sm. L. C. 496—499, 6th ed.

(*p*) *Lumley* v. *Gye*, 2 E. & B. 216.

(*q*) 8 East, 3.

(*r*) And see *Haddan* v. *Lott*, 15 C. B. 411; 24 L. J. C. P. 49; [and *ante*, p. 42.]

acted in the same way, had the slander not been used (*s*), if the act did in fact follow from the words. But an injury which did not naturally ensue from the libel, and might have arisen from other causes, cannot be ground of action. Defendant published a libel on an actress whom plaintiff had engaged to sing for him; she refused to sing from fear of being hissed, and he claimed for loss of profits. Lord Kenyon said, the injury was too remote, and impossible to be connected with the cause assigned for it. Her refusal to perform might have proceeded from groundless apprehension of what might never have happened, or from caprice or insolence (*t*). Of course, where words do not in themselves, or by the interpretation put upon them by the plaintiff in his declaration, bear a defamatory meaning, no amount of special damage will form a ground of action, or be admissible in evidence. Such special damage is not the natural or necessary consequence of the words (*u*); nor can evidence be received of injury to other persons than the plaintiff, as, for instance, to his wife, though she was one of the persons assailed in the libel (*x*).

The loss of substantial hospitality, which had been a permanent addition to the plaintiff's income, is good ground of special damage (*y*). [Loss of the society of acquaintances is not, nor illness resulting from the slander (*z*).]

Evidence in mitigation of damage.

That defendant did not originate the libel.

As a general rule, any evidence may be given in behalf of the defendant to prove the absence of malice, with a view to mitigate the damages (*a*). Accordingly he may show that he said, at the time he spoke the words, that he heard the slanderous matter from another person whom he named, and may prove the truth of this (*b*); or that he had copied the

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(*s*) *Knight* v. *Gibbs*, 1 Ad. & Ell. 43: cited *ante*, p. 33.

(*t*) *Ashley* v. *Harrison*, 1 Esp. 49. See *Haddon* v. *Lott*, *ubi sup.*

(*u*) *Morris* v. *Langdale*, 2 B. & P. 284; *Kelly* v. *Partington*, 5 B. & Ad. 645.

(*x*) *Guy* v. *Gregory*, 9 C. & P. 584.

(*y*) *Moore* v. *Meagher*, 1 Taunt. 39; [*Davies and Wife* v. *Solomon*, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10.]

[(*z*) *Allsop* v. *Allsop*, 5 H. & N. 534; 29 L. J. Ex. 315; and see *Roberts* v. *Roberts*, cited *ante*, p. 370. Whether a wife can sue for words occasioning the loss of the consortium of her husband, was discussed but not decided, in *Lynch* v. *Knight*, 9 H. of L. Cases, 577; 2 Smith's L. C. 492, 6th ed.]

(*a*) *Pearson* v. *Lemaitre*, 6 Sco. N. R. 607.

(*b*) *Bennett* v. *Bennett*, 6 C. & P. 588.

statement from another newspaper (*c*). But he cannot show that the defamatory matter appeared simultaneously in other papers (*d*). And where the words profess to be an account of what took place in a court of justice, although this will be no defence unless the account is perfectly fair and accurate, still, even though the report is not correct, if it is an honest one, and intended to be a fair account of what really occurred, this will be ground for reducing the damages (*e*). We have seen before, that persisting in a plea of justification which is abandoned, or not proved, may be ground for increasing the damages. On the other hand, facts which go to support such a plea may be given in evidence in mitigation of damages, though they fail to prove the plea; and that whether there is a plea of justification on the record or not; and even where there has been such a plea, which has been withdrawn (*f*). Where, however, such facts would, if pleaded, be a complete bar to the action, they cannot be adduced even in mitigation of damages (*g*). This was probably the ground of the decision in *Vessey* v. *Pike* (*h*), of which we have only a very meagre report, where evidence of this nature was rejected. In no case can facts so proved go in bar of the action, unless there is a plea to support them (*i*).

That he had reason to believe it.

So evidence that the plaintiff had libelled the defendant, though no defence to the action, will go in reduction of damages (*k*). But such libels must be shown to relate to the subject-matter of those published by the defendant (*l*). And he must prove that the libel which he complains of came to his knowledge before he libelled the plaintiff (*m*).

That he had received previous provocation.

A very important question, which has been constantly raised, and yet remains still undecided, is as to the admis-

General bad character.

(*c*) *Mullett* v. *Hulton*, 4 Esp. 248; *Saunders* v. *Mills*, 6 Bingh. 213; [*Davis* v. *Cutbush*, 1 F. & F. 487.]
(*d*) 6 Bingh. 213.
(*e*) *Smith* v. *Scott*, 2 C. & K. 580.
(*f*) *Chalmers* v. *Shackell*, 6 C. & P. 475; *East* v. *Chapman*, 2 C. & P. 570.
(*g*) *Speck* v. *Phillips*, 5 M. & W. 279.
(*h*) 3 C. & P. 512.
(*i*) *Charlton* v. *Watton*, 6 C. & P. 385.
(*k*) *Finnerty* v. *Tipper*, 2 Camp. 76; [*Kelly* v. *Sherlock*, L. R. 1 Q. B. 686; 35 L. J. Q. B. 209; 7 B. & S. 480.]
(*l*) *May* v. *Brown*, 3 B. & C. 113; *Tarpley* v. *Blabey*, 2 Bingh. N. C. 437.
(*m*) *Watts* v. *Fraser*, 7 Ad. & Ell. 223.

sibility, in mitigation of damages, of evidence showing that defendant laboured under a general suspicion of being guilty of the offence charged in the libel. The question is ably discussed in a recent work on evidence (*n*), where all the authorities are collected. The conclusion arrived at by the learned author is, "that the weight of evidence inclines slightly in favour of the affirmative, even though the defendant has pleaded truth as a justification, and has failed in establishing his plea." In a late case, however, the opinion of the Court of Queen's Bench seemed on the whole against the evidence, and they decided that it could only be received as to reports existing at the time of the publication, otherwise the reports adduced to diminish damages might have been caused by the very slander for which the action was brought (*o*). Such evidence must, in any case, be confined to the particular trait which is attacked by the libel, and cannot refer to particular acts (*p*).

Evidence of truth of libel.

Where there is a plea justifying a libel, it is no evidence in proof of its truth, that the same imputations had been published before, and that the plaintiff had submitted to them. The fallacy lies in the word "submission." It comes to this only, that he did not prosecute; and there might be a great many reasons for his not proceeding to prosecute,—the anonymous nature of the article, not knowing whether it came from a man of character, or the poverty of the party himself (*q*).

Former recovery against a third party.

Evidence of a mere collateral fact, as that the plaintiff had already recovered against the proprietor of another paper for inserting the same libel, cannot be given in mitigation of damages (*r*).

Apology for libel in newspaper.

[Where in an action for a libel contained in a newspaper the defendant pleads under 6 & 7 Vict., c. 96, s. 2, that the

(*n*) Tayl. Evidence, 315, 2nd ed., [364, 6th ed.]
(*o*) *Thompson* v. *Nye*, 16 Q. B. 175.
(*p*) Tayl. Evidence, 316, [364, 6th ed.] [In Ireland, where the slander imputed to an officer that he had stolen a gold chain, evidence of the plaintiff's being generally reputed to have committed the act was rejected; but evidence of general bad character, or of his having some vicious habit leading to the particular act, was considered admissible; *Bell* v. *Parke*, 11 Ir. C. L. R. 413. See further, *Bracegirdle* v. *Bailey*, 1 F. & F. 536.]
(*q*) *Reg.* v. *Newman*, 1 E. & B. 268.
(*r*) *Creevy* v. *Carr*, 7 C. & P. 64.

libel was inserted without malice or gross negligence, and that a full apology was inserted, and pays money into Court by way of amends, if the jury find the apology not sufficient, the damages should be assessed irrespectively of the sum paid into Court, and without considering that payment in any way as an admission of liability (*s*).]

Actions for breach of promise of marriage.

8. Actions for breach of promise of marriage ought strictly to have been considered under the head of Contracts, in an earlier part of this work. They are, however, of so exceptional a nature, and so closely connected with actions for seduction, as to the evidence which may be adduced, that I have thought it more convenient to defer the examination till now.

It is quite needless to say that no attempt at fixing any measure of damages can be made in regard to this species of suit, or the other, just alluded to, which follows it. They stand on a par with actions for libel as to the range of topics in which counsel are allowed to indulge. Even the stereotyped direction of the judge, that the jury should give "temperate" damages, conveys no very definite idea to the mind.

Evidence of defendant's condition in life.

The circumstances which aggravate the damages in an action of this sort are so obvious as to require no comment. One important fact consists in the wealth and social position of the defendant, as it shows what the plaintiff has lost by the breach of contract (*t*). Accordingly we find in one case, where the action was brought by the gentleman against the lady, that 400*l.* was held not to be an excessive amount of damages: the fair one being, as the cold-blooded reporter says, "worth 3000*l.* when the plaintiff courted, and afterwards, by the death of her brother, worth double that sum" (*u*). And so a verdict of 3500*l.* was supported in another case, where the defendant was a man of property (*x*).

[(*s*) *Jones* v. *Mackie*, L. R. 3 Ex. 1; 37 L. J. Ex. 1.]

(*t*) *James* v. *Biddington*, 6 C. & P. 590. [General evidence may be given of the defendant's property, but not proof of particular items; *Kerfoot* v. *Marsden*, 2 F. & F. 160, *per* Wilde, B.]

(*u*) *Harrison* v. *Cage*, Carth. 467.

(*x*) *Wood* v. *Hurd*, 2 Bingh. N. C. 166.

Aggravation by seduction.

[Where the plaintiff had been seduced by the defendant, it was held no misdirection to tell the jury that they might take into consideration the plaintiff's lessened prospect of marrying another, and the difference of her position in returning to her mother's house, not as a virtuous and respected member of the family, but as a disgraced woman (*y*). It is evident, however, that unless a direction to a jury to this effect is put, to use the expression of Willes, J., "in the driest language" (*z*), a jury will be apt to interpret it into permission to give damages for the seduction as well as for the breach of promise of marriage.]

Evidence in mitigation of damage.

Any evidence will be admissible in reduction of damages, which palliates, though it does not excuse, the breach of promise; or which proves that the plaintiff had no great loss in the matter; or that the match was in any way unsuitable, and unlikely to have produced happiness. And here it is necessary to distinguish between facts which go to bar the action entirely, and those which merely serve in mitigation of damages.

When the action is barred.

It is a complete defence to the action, that the defendant was induced to enter into or continue the connection by false representations, as to the circumstances of the family, or the previous life of the plaintiff, or even by a wilful suppression of the real state of affairs upon these points (*a*); or that at the time of making the promise he was ignorant of her previous immoral life (*b*), even though she had only been guilty of a single act of unchastity, and at a distance of many years, and had since lived a perfectly correct life (*c*). So, where the plaintiff is a man, it will be a sufficient answer to show, that subsequently to her promise he had conducted himself in a brutal manner, and threatened to use her ill, for this gives her a right to say that she will not commit her happiness to his keeping (*d*); or that he is a person of

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[(*y*) *Berry* v. *Da Costa*, L. R. 1 C. P. 331; 35 L. J. C. P. 191.]
[(*z*) L. R. 1 C. P., at p. 333.]
(*a*) *Wharton* v. *Lewis*, 1 C. & P. 529; *Foote* v. *Hayne*, *ibid.*, 546. [In the absence of fraud it is no defence that the plaintiff was at the time of the promise engaged to another man, and concealed it from the defendant; *Beechey* v. *Brown*, E. B. & E. 796; 29 L. J. Q. B. 105.]
(*b*) *Irving* v. *Greenwood*, 1 C. & P. 350.
(*c*) *Bench* v. *Merrick*, 1 C. & K. 463.
(*d*) *Leeds* v. *Cook*, 4 Esp. 256.

proved bad character (*e*). So the existence of some bodily infirmity, to which the plaintiff is subject, which was not known at the time of the contract, will be a complete bar (*f*). [But it has since been held in the Exchequer Chamber that it is no defence that the defendant, after the promise, became subject to a disease which rendered him incapable of marrying without danger of his life (*g*). And upon the authority of that case it was held no defence that the plaintiff had been lunatic, which was not known to the defendant at the time of the contract (*h*).]

Evidence of character, conduct, &c.

On the other hand, unchaste conduct, known when the promise was made, only operates in reduction of damages (*i*). So mere grossness of manners, and want of feeling, are not grounds for breaking off the contract, nor even palpable want of affection. But all such circumstances are most important in testing the amount of injury the plaintiff has sustained. The mutual suitability of the parties, and the real affection felt by the plaintiff, may fairly be considered by the jury, when a man complains of having lost the society of one whom he appears never to have valued, and the pleasures of whose society he was little calculated to taste (*k*).

The bad character of a man, when it merely rests upon report, without specific proof of facts, has been held to be mere evidence in mitigation of damages, and not a complete bar (*l*). In one instance, however, Lord Kenyon allowed general evidence of the immodest character of a woman to go in bar of the action. He said, that in such a case character was the only point in issue, and that was public opinion, founded on the character of the party. He therefore considered that what that public thought was evidence (*m*).

Damages in seduction not confined to compensation for loss of service.

9. The action for seduction, properly so called, is rather an anomalous one. In form it purports to be merely an action for the consequential damage arising from the loss of

(*e*) *Baddeley* v. *Mortlock*, Holt, N. P. 151.
(*f*) *Atchinson* v. *Baker*, 2 Peake, 103.
[(*g*) *Hall* v. *Wright*, E. B. & E. 746; 29 L. J. Q. B. 43; decided by four judges to three, the Court below having been equally divided.]
[(*h*) *Baker* v. *Cartwright*, 10 C. B. N. S. 124; 30 L. J. C. P. 364.]
(*i*) *Bench* v. *Merrick*, *ubi sup.*
(*k*) *Per* Lord Ellenborough, *Leeds* v. *Cook*, 4 Esp. 257.
(*l*) *Baddeley* v. *Mortlock*, *ubi sup.*
(*m*) *Foulkes* v. *Sellway*, 3 Esp. 236.

service, resulting from the act complained of. Hence the action will fail unless some loss of service can be shown (*n*). And where the loss of service arose from the illness of the daughter, which was not caused by the seduction, but by grief at being subsequently abandoned, the Court doubted whether the action could be maintained (*o*). The logical result would be, that damages could be given on no other ground. This is not the case however. It has been laid down, that actions of this sort are brought for example's sake, and although the plaintiff's loss may not really amount to the value of twenty shillings, yet the jury do right in giving liberal damages (*p*). And so Lord Kenyon said, "In point of form the action only purports to give a recompense for the loss of service, but we cannot shut our eyes to the fact, that this is an action brought by the parent for an injury to her child. In such a case I am of opinion that the jury may take into consideration all that she can feel from the nature of the loss. They may look on her as losing the comfort, as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children, whose morals may be corrupted by her example (*q*). And not only the wounded feelings of the plaintiff, but also the dishonour resulting from the act, may form part of the estimate of damages" (*r*).

Damages ought to be governed by a due regard to the situation in life of all the parties (*s*).

Evidence of promise of marriage.

The circumstances of premeditation or fraud, by which the act was accomplished, will of course weigh heavily with the jury in assessing damages. It has been said, however, that evidence cannot be received that defendant effected his object by means of a promise of marriage. Lord Ellenborough said, "You may ask her whether he paid his addresses in an

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[(*n*) In the case of a minor, a right to the service is sufficient; and when she ceases to be under the control of a real master, and intends to return to her father's house, she is constructively in his service; *Terry* v. *Hutchinson*, L. R. 3 Q. B. 599; 37 L. J. Q. B. 257.]

(*o*) *Boyle* v. *Brandon*, 13 M. & W. 738.

(*p*) *Per* Wilmot, C. J., *Tullidge* v. *Wade*, 3 Wils. 18.

(*q*) *Bedford* v. *M'Kowl*, 3 Esp. 119.

(*r*) *Southernwood* v. *Ramsden*, Selw. N. P. 1127, 12th ed.; *Andrews* v. *Askey*, 8 C. & P. 7. [See *Berry* v. *Da Costa*, *ante*, p. 376.]

(*s*) *Andrews* v. *Askey*, *ubi sup.*

honourable way; to admit evidence of a direct promise of marriage, would be to allow the mother to recover damages for a breach of that promise, upon the testimony of the daughter" (*t*). But the evidence has been received in several cases, on the ground that otherwise it might appear to the jury that the daughter was a wanton (*u*). In one case the distinction was said to be, that such evidence could not be relied on, as a prominent part of the case, for the purpose of obtaining specific damages, but that it might be used collaterally to the main object of the action, with a view to the vindication of the young woman's character (*x*).

Evidence of general chastity.

No evidence of general good character for chastity is admissible in aggravation of damages, until an attempt has been made to prove the contrary (*y*). It has even been laid down, that imputations cast upon her good fame in cross-examination are not sufficient ground to admit evidence in rebuttal (*z*). The contrary rule has been laid down in some later cases. In one, the cross-examination of the girl went to show that she had conducted herself immodestly towards the defendant before the seduction, and kept improper company. In the other, she was questioned as to her having had criminal intercourse with other men. The plaintiff was allowed to prove her general good character and modest deportment, and the general respectability of the family (*a*).

Mitigation of damages, immodest conduct.

Evidence may be given, in reduction of damages, of the general indelicacy and levity of character of the female seduced (*b*); and specific instances of intercourse between her and other men may be deposed to (*c*); but the daughter herself cannot be questioned as to such acts (*d*). Any declarations made by herself, as for instance, that a third person

(*t*) *Dodd* v. *Norris*, 3 Camp. 519; *Tullidge* v. *Wade*, 3 Wils. 18.
(*u*) *Watson* v. *Bayless*; *Murgatroyd* v. *Muryatroyd*, 3 Stark, Ev. 990.
(*x*) *Elliott* v. *Nicklin*, 5 Pri. 641.
(*y*) *Bamfield* v. *Massey*, 1 Camp. 460.
(*z*) *Dodd* v. *Norris*, 3 Camp. 519.
(*a*) *Bate* v. *Hill*, 1 C. & P. 100; *Murgatroyd* v. *Murgatroyd*, 2 St. Ev. 307; *Brown* v. *Goodwin*, Ir. Cir. Rep. 61.
(*b*) *Bamfield* v. *Massey*; *Dodd* v. *Norris*, *ubi sup.*
(*c*) *Verry* v. *Watkins*, 7 C. & P. 308.
(*d*) *Dodd* v. *Norris*, *ubi sup.* [But, from the analogy of the decisions in affiliation cases, it would seem that such questions may be put, and even evidence be given in contradiction, if it goes to show that some one else may have been the father of the child; *Garbutt* v. *Simpson*, 32 L. J. M. C. 186; and see *R.* v. *Gibbons*, 31 L. J. M. C. 98.]

was the father of the child ascribed to the defendant, may however be proved, provided she has been given an opportunity of explaining or denying them (*e*).

Negligence of the plaintiff.

Gross negligence on the part of the plaintiff may also be proved, with the same view. In one case, where he had suffered the defendant to continue his visits, as a suitor to his daughter, though he knew him to be a married man, on an alleged probability of his obtaining a divorce, and after he had been cautioned against him, Lord Kenyon directed a nonsuit (*f*).

Seducing from service.

Damages for the mere seducing away of an actual servant from the employment of the master, of course rests upon quite a different basis. They would be regulated by the actual money loss resulting from the act, unless where strong evidence of malice was shown. In estimating the injury sustained, the jury are not limited to the time during which the servant was bound to continue with his master. Where the workmen of a piano-maker were enticed away from him; it appeared that they were engaged for no fixed time, but worked by the piece. His income from his trade was 800*l.* per annum, and a verdict for 1600*l.* was held not to be excessive (*g*).

No action will lie against the seducer of a servant, when the master has recovered against the latter a stipulated penalty, agreed on in case of his leaving the service (*h*).

Adultery.

10. [By the act which established the present Divorce Court, 20 & 21 Vict. c. 85, actions for criminal conversation were abolished (*i*). It is, however, by the same act provided that a husband may in a suit for dissolution of marriage, or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of adultery with the petitioner's wife; and the claim is to be tried on the same principles, and subject to the same rules, as actions for criminal conversation were previously tried and decided in Courts of Common Law. After the verdict the

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(*e*) *Carpenter* v. *Wall*, 11 A. & E. 803.

(*f*) *Reddie* v. *Scoolt*, 1 Peake, 240.

(*g*) *Gunter* v. *Astor*, 4 Moo. 12. [The action lies for enticing away the plaintiff's daughter, though there may have been no binding contract of service; *Evans* v. *Walton*, L. R. 2 C. P. 615; 36 L. J. C. P. 307.]

(*h*) *Bird* v. *Randall*, 3 Burr. 1346.

[(*i*) S. 59.]

Court has power to direct in what manner the damages are to be applied, and to direct the whole or a part to be settled for the benefit of the children of the marriage, or for the maintenance of the wife (*k*)].

Grounds of damage in crim. con.

The general principles upon which damages were given in crim. con. were laid down with great clearness by an eminent judge. He said, "The action lies in this case for the injury done to the husband in alienating his wife's affections, destroying the comfort had from her company, and raising children for him to support and provide for; and as the injury is great, so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case. The rank and quality of the plaintiff; the condition of the defendant; his being a friend, relation, or dependant of the plaintiff; or being a man of substance; proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant, and her having always borne a good character till then; and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation (*l*)." It will only be necessary to add a few words in elucidation of this summary.

As almost the whole foundation of this action consisted in the loss of the wife's society and affection, it was most important with a view to damages, to ascertain what the extent of this loss was, and how far it had been caused by the acts of the defendant.

Separation between husband and wife.

Where the plaintiff had entirely given up the society of his wife, he could not sue in respect of acts of adultery subsequent to the separation (*m*); but it was different where, though separated, he had still retained a right to the assistance of his wife, in the management and care of his family (*n*). It

[(*k*) S. 33. See *Comyn* v. *Comyn and Humphreys*, 32 L. J. P. M. & A. 210. The insertion of a claim for damages does not affect the discretion as to costs given to the Court by s. 51; *West* v. *West and Parker*, L. R. 2 P. & D. 196; 40 L. J. P. & M. 11.]

(*l*) Bull. N. P. 27. [In *Bell* v. *Bell and Marquis of Anglesey*, 29 L. J. P. M. & A. 159, the jury were allowed to take the marriage settlement into consideration in assessing the damages, there being no children of the marriage, and the Court therefore having no power to deal with the settlements under 22 & 23 Vict. c 61, s. 5.]

(*m*) *Weedon* v. *Timbrell*, 5 T. R. 360.

(*n*) *Chambers* v. *Caulfield*, 6 East, 244.

was held too, that even a complete separation, if without deed, would be no bar to an action, since there was nothing to prevent the plaintiff instituting a suit to regain the society of his wife (*o*). Of course the same rule applied more strongly where the separation was a mere matter of mutual convenience; as where the husband and wife were living in different families (*p*). Such facts, however, would go strongly to reduce the damages. So it was considered in one case, where the plaintiff had married an actress, but concealed his marriage, and visited her very seldom, she continuing to live with her mother, and pursue her profession. Tindal, J. C., said, "There appears in this case to have been less of that intercourse between husband and wife, to compensate for the loss of which suits of this nature are instituted, than I have ever met with" (*q*).

There is a curious case in which the husband had never known of his wife's infidelity till the eve of her death, when she herself disclosed it to him, and he then continued to treat her kindly till she died. It was held that the action was maintainable. Coleridge, J., said, in charging the jury, "The only grounds on which you ought to give damages to the plaintiff are, the shock which has been given to his feelings, and the loss of the society of his wife down to the time of her death" (*r*).

Evidence of the terms upon which they lived.

Another mode of testing the loss sustained by the husband, was to ascertain the amount of enjoyment he used to derive from the society of his wife, and the terms upon which they lived with each other. With this view, not only their conduct when they were together, but even their letters were admissible, since the latter constituted the only mode of proof when they were separated. Letters were evidence for this purpose, even though written to a third party, and containing other matter which would not be evidence (*s*). But it was necessary to show that the letters were written at the time they bore date, and

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(*o*) *Graham* v. *Wigley*, *per* Abbott, C. J., 2 Rop. Husb. & W. 323.
(*p*) *Edwards* v. *Crock*, 4 Esp. 39.
(*q*) *Calcraft* v. *Lord Harborough*, 4 C. & P. 499.
(*r*) *Wilton* v. *Webster*, 7 C. & P. 198.
(*s*) *Willis* v. *Bernard*, 8 Bingh. 376. [As to letters between husband and wife, see *Stone* v. *Stone and Appleton*, 34 L. J. P. M & A. 33.]

before suspicion was entertained of the wife's misconduct (*t*). And their dates were not sufficient proof of the time they were written (*u*). Evidence might also be received of the wife's complaints as to her husband's ill treatment of her, though not made in his presence, as showing the manner in which the parties lived together. That is made up of a number of acts of the two parties, of which such complaints form a part (*x*).

Infidelity of husband.

Lord Kenyon, on two occasions, held that open infidelity on the part of the husband went in bar of the action (*y*). Lord Alvanley, however, decided that it only went in mitigation of damages. "The fact," said his lordship, "that the wife had been injured by the husband's misconduct, could not warrant her in injuring him in that way which was the keenest of all injuries" (*z*). [A discretionary power is now given to the Court to pronounce a decree for dissolution of marriage where the petitioner has himself been guilty of misconduct (*a*).]

Character of wife.

The plaintiff's loss depended also, of course, on the previous character of his wife. Accordingly evidence that the wife was living as a prostitute, or that she had committed previous acts of misconduct, before the adultery charged, and without the husband's privity, went in mitigation of damages (*b*). But acts of this sort, committed subsequently, could not be used for this purpose, for they might be the direct result of the degradation brought upon her by the defendant (*c*). This limitation must be appended to the words of a learned judge, when he said, "With respect to damages, if you are of opinion that the plaintiff's wife would be of no service, but on

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(*t*) *Edwards* v. *Crock*, 4 Esp. 39; *Trelawney* v. *Coleman*, 1 B. & A. 90.

(*u*) *Houliston* v. *Smyth*, 2 C. & P. 24.

(*x*) *Winter* v. *Wroot*, 1 M. & Rob. 404.

(*y*) *Sturt* v. *Marquis of Blandford*; *Windham* v. *Wycombe*, 4 Esp. 17.

(*z*) *Bromley* v. *Wallace*, 4 Esq. 237. [A witness cannot be cross-examined as to any act of adultery, unless he or she has already given evidence in disproof of it (32 & 33 Vict. c. 68, s. 4); therefore a husband petitioning for dissolution of marriage cannot, with a view to mitigation of damages, be asked questions tending to show that he had been guilty of adultery in the lifetime of his first wife; *Babbage* v. *Babbage and Manning*, L. R. 2 P. & D. 222.]

[(*a*) 20 & 21 Vict. c. 85, s. 31. As to the exercise of the discretion, see *Latour* v. *Latour and Weston*, 31 L J. P. M. & A. 66; 2 Sw. & Tr. 524; *Goode* v. *Goode and Hamson*, 30 L. J. P. M. & A. 105; 2 Sw. & Tr. 253.]

(*b*) *Smith* v. *Allison*, Bull. N. P. 27.

(*c*) *Elsam* v. *Faucett*, 2 Esp. 562.

the contrary a disservice to him and his children, a small amount of damages will be sufficient" (*d*).

Husband himself to blame.

Where the husband was himself, knowingly, the cause of his own disgrace, no action at all lay (*e*). But evidence of mere carelessness, and neglect of the husband, in not putting a stop to culpable familiarities went merely in reduction of damages, unless amounting to connivance (*f*). The plaintiff was entitled to recover unless he had in some degree been a party to his own dishonour, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with the defendant, or by having totally and permanently given up all the advantage to be derived from her society (*g*). And when connivance was set up, the wife's own statements were admissible, to show what may have misled the husband in permitting that conduct which led to the result (*h*). [So under 20 & 21 Vict. c. 85, s. 30, if the petitioner has been an accessory to or has connived at the adultery, the petition must be dismissed. Connivance has been defined to be something more than mere negligence, inattention, or indifference. There must be an intention on his part that his wife should commit adultery, or at any rate a willing consent (*i*).]

Defendant misled or solicited.

Even where there was no pretence of connivance on the part of the plaintiff, damages were reduced by anything which showed that the defendant was led into the crime by circumstances not originating with himself. Therefore, in a case mentioned before, where the woman was an actress, married privately, living apart from her husband, in the pursuit of her profession, Tindal, C. J., said, "You may consider, in estimating the damages, how far the plaintiff interfered to protect his wife from the temptations to which, by her profession, she was exposed. You may also consider whether the defendant knew that she was a married woman, or might conclude that she

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(*d*) *Winter* v. *Henn*, 4 C. & P. 494.
(*e*) *Smith* v. *Allison*, *ubi sup.*
(*f*) *Duberley* v. *Gunning*, 4 T. R. 655.
(*g*) *Winter* v. *Henn*, *ubi sup.*, *per* Alderson, B.
(*h*) *Hoare* v. *Allen*, 3 Esp. 276.
[(*i*) *Allen* v. *Allen*, 2 Sw. & Tr. 108, n. (1); *Marris* v. *Marris*, 2 Sw. & Tr. 530; 31 L. J. P. M. & A. 69; *Ellyatt* v. *Ellyatt*, *Taylor*, *and Halse*, 3 Sw. & Tr. 504; 33 L. J. P. M. & A. 137; *Adams* v. *Adams and Colter*, L. R. 1 P. & D. 333.]

was still single, and attending as an actress at the theatre" (*k*). And so the fact that the defendant was first solicited by the wife had the same effect (*l*).

Evidence of defendant's wealth.

We have seen that the defendant's condition, and his being a man of substance, were relied on by Buller, J., as matters which properly enhanced the damages (*m*). In one case, however, Alderson, B., refused to admit evidence of the amount of the defendant's property. He said that in actions of this kind, a plaintiff is entitled to as much damage as a jury shall think is a compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the cause (*n*). The two dicta do not conflict at all, if the latter is taken as merely excluding specific evidence of the defendant's income. If such evidence were allowed, he ought to be let in to show that his income was over-rated, and a number of collateral issues would at once be raised. If however, it means that general evidence cannot be given, to show whether the defendant is a pauper or a millionaire, it seems hard to agree with it in theory, and impossible to reconcile it with practice. It is quite at variance with the principle, which rests on high authority, that damages in these cases are intended as a penalty, as well as a compensation (*o*). This they cannot be, unless they bear a proportion to the means of the defendant. Even as a matter of mere compensation it may be doubted whether such a view is fully sustainable. A social injury cannot really be represented by any sum of money. The amount is merely a scale by which the jury express their idea of the degree of suffering caused. But ought not the sacrifice imposed on the defendant to bear some ratio to the suffering caused to the plaintiff? These are things commensurate in their nature. If a money standard is to be applied to the one, it ought also to be applied to the other. Suppose the jury, knowing nothing of the circumstances of the defendant, assess damages at 1,000*l.*, when he is not worth 100*l.* This amounts simply to his ruin. Is it fair, as a mere matter of compensation, to offer the total extinguishment of the wrong-

(*k*) *Calcraft* v. *Lord Harborough*, 4 C. & P. 499.
(*l*) *Elsam* v. *Faucett*, 2 Esp. 562.
(*m*) *Ante*, p. 381.
(*n*) *James* v. *Biddington*, 6 C. & P. 590.
(*o*) See ante, p. 25.

doer as a satisfaction for a partial, though severe injury, to the person wronged? We have, in mercy, abandoned the old law, which said, "an eye for an eye, and a tooth for a tooth;" but this would be giving a whole life for an eye, or something not quite so valuable. It may be considered, too, whether such a course would not be a violation of the spirit, if not of the letter, of Magna Charta, which provides that no freeman shall be amerced to the utter destruction of his means of subsistence (*p*).

[Since 20 & 21 Vict. c. 85, it has been ruled that the jury have nothing to do with the co-respondent's fortune unless he has used it as a means of seduction, in which case they may take it into account in considering the value of the wife of whom the petitioner has been deprived (*q*).]

Former recovery where there were several paramours.

A former recovery against one defendant for adultery, was no bar to an action against another defendant, for a similar injury during the same time (*r*), for each might have inflicted a very different degree of wrong upon the plaintiff. Accordingly, upon a trial, in which the defendant was the plaintiff's own coachman, and where there was evidence that the wife had been criminally connected with others also, Lord Ellenborough directed the jury to award damages, proportioned barely to so much of the plaintiff's loss of comfort as the defendant's misconduct might be supposed to have occasioned; but not to the whole of the injury the plaintiff had suffered, which there seemed reason to suspect might be attributed to others in a superior condition of life, much more than to the solicited coachman (*s*).

[In directing in what manner the damages should be applied, the Court for Divorce and Matrimonial Causes has most usually allowed the petitioner his costs which have not been taxed against the co-respondent. With the residue, provision has been made for the maintenance of the wife (*dum casta vixerit*), and children by purchasing annuities for them or by investing the amount, the wife taking the interest, and the principal sum passing to

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(*p*) *Salvo Contenemento;* that is, preserving to the soldier his arms, and to the scholar his books; 2 Inst. 29.

[(*q*) *Cowing* v. *Cowing and Wollen*, 33 L. J. P. M. & A. 149; *Forster* v. *Forster and Berridge*, *Ib.*, 150, n.]

(*r*) *Gregson* v. *M'Taggart*, 1 Camp. 415.

(*s*) *Gregson* v. *Theaker*, 1 Camp. 415, n.

the children at her death (*t*). It has been ruled in the same Court that if the co-respondent does not appear, the jury are bound to take for granted that he committed the adultery. Therefore even when they found that the respondent had not committed adultery with the co-respondent they were directed to assess the damages at a nominal sum against the latter (*u*). If the co-respondent appears but does not file an answer, he cannot cross-examine witnesses or address the jury in mitigation of damages, but after decree he may re-call and cross-examine witnesses and address the Court upon the question of costs, as for example by shewing that the co-respondent did not know the respondent to be a married woman (*x*).]

[(*t*) See *Latham* v. *Latham and Gethin*, 30 L. J. P. M. & A. 43; *Clarke* v. *Clarke*, 31 L. J. P. M. & A. 61; *Narracott* v. *Narracott and Hesketh*, 33 L. J. P. M. & A. 132; *Billingay* v. *Billingay and Thomas*, 35 L. J. P. M. 84; *Callwell* v. *Callwell and Kennedy*, 3 Sw. & Tr. 259; *Forster* v. *Forster and Berridge*, 3 S. & T. 158; S. C. 4 S. & T. 131; 34 L. J. P. M. & A. 88. In *Taylor* v. *Taylor and Wolters*, 39 L. J. P. & M. 23, nothing was given to the wife. And where there had been no issue of the marriage, and the respondent was living with the co-respondent, the Court directed the damages to be paid to the petitioner; *Evans* v. *Evans and Bird*, L. R. 1 P. & D. 36.]

[(*u*) *Stone* v. *Stone and Appleton*, 34 L. J. P. M. & A. 40, n. And evidence is admissible to aggravate the damages as against the co-respondent; *Ib.*; 3 Sw. & Tr. 608.]

[(*x*) *Lyne* v. *Lyne and Blackney*, 37 L. J. P. M. A. 9.]

CHAPTER XVI.

1. *Actions by and against Executors.*
2. *Actions by Trustees in Bankruptcy.*
3. *Actions by Principal against Agent.*

I PROPOSE to conclude the portion of this work which treats of the measure of damages, by examining some cases in which the parties stand in a peculiar relation to each other, which affects their right to sue, and the amount they may recover. Such a relationship exists in the case of actions by trustees in bankruptcy, and by and against executors. In all these, the damages which can be obtained may be modified, more or less, by the fact that the party to the suit is not the person originally entitled to sue or be sued, but one placed in that position by law. So far as they are not modified in this manner, they come under the ordinary rules laid down previously. Damages in actions by a principal against his agent are in general exactly the same as they would be where the parties were unconnected with each other. The case, however, admits of some remarks peculiar to itself, for which this chapter seems to present the most proper place.

When executors may sue.

I. It would be impossible, without wandering from the strict object of the present treatise, to state the cases in which actions will lie by and against executors. The subject has been so exhausted and discussed in well-known works upon the subject, that it would be waste of time to enter upon it here at any length (*a*). The broad principle upon which actions by executors rests, is, that they must be brought in respect of some wrong which affects the personal estate of the deceased. Hence an

(*a*) See Wms. Exors. 738, 1590, 6th ed.; 1 Wms. Saund. 216, a.; [1 Wms. Notes to Saund. 239.]

executor may sue an attorney for negligence in investigating the title of an estate, about to be conveyed to the testator, by means of which he took a bad title, and was unable to sell the property. And the Court remarked, that if a man contracted for a safe passage in a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, the executor might sue in assumpsit for the consequences of the breach of contract (*b*). And so the executor may sue for breach of a contract to complete the sale of land, whereby the deceased lost the benefit of the purchase, and was put to expense in endeavouring to procure the title, and was deprived of the use of his money deposited (*c*). Nor is it necessary to prove actual and specific damage, provided the breach of contract might possibly have caused such damage. Therefore, the executor may sue for breach of covenant not to fell or lop timber-trees, committed during the life of the testator, though none of the timber was removed by the defendant (*d*). And so upon a covenant to repair, broken before the death of the covenantee (*e*). In such a case, though the covenant relates in terms to the realty, a breach of it is a direct injury to the personal estate; and this is the sort of injnry which is primarily contemplated by it. But it is different where the primary object of the covenant is to preserve the real estate *in specie*. There the heir, and not the executor, is the person to sue even for a breach in the lifetime of the testator, unless some consequential damage to the personalty has ensued. So it was held, where the actions were for breach of covenant for title and right to convey, and for further assurance (*f*). Lord Ellenborough, C. J., said (*g*), "In this case there is no other damage than such as arises from a breach of the defendant's covenant that he had a good title, and there is a difficulty in admitting that the executor can recover at all without also allowing him to recover to the

(*b*) *Knight* v. *Quarles*, 2 B. & B. 102. [And see *per* Willes, J., in *Alton* v. *Midland Ry. Co.*, 19 C. B. N. S. at p. 242; 34 L. J. C. P. at p. 298.]
(*c*) *Orme* v. *Broughton*, 10 Bingh. 533.
(*d*) *Raymond* v. *Fitch*, 2 C. M. & R. 588.
(*e*) *Ricketts* v. *Weaver*, 12 M. & W. 718.
(*f*) *Kingdon* v. *Nottle*, 1 M. & S. 355; *King* v. *Jones*, 5 Taunt. 418; 4 M. & S. 188, affirmed on error.
(*g*) 1 M. & S. 363.

full amount of the damages for such defect of title; and in that case a recovery by him could bar the heir, for I apprehend the heir could not afterwards maintain an action for the same breach. Had the breach been assigned specially with a view to compensation for a damage sustained in the lifetime of the testator, and so as to have left a subject of suit entire to the heir, this action might have gone clear of the difficulty." And on this ground the case was distinguished from that of *Lucy* v. *Levington* (*h*), because there an eviction had taken place in the lifetime of the testator; and, therefore, the damages in respect of such eviction, for which the action was brought, were properly the subject of suit and recovery by the executor, and nothing descended to the heir.

When executor cannot sue.

In no case can an action be maintained, where it appears upon the face of the record that no damage to the personal estate could have arisen. Hence an executor cannot sue for breach of promise of marriage to the testator, unless special damage is shown. Executors are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. If such an action were maintainable, then every action founded on an implied promise to the testator, where the damage subsists in the previous personal suffering of the testator, would be also maintainable by the executor. All injuries affecting the life or health of the deceased; all such as arise out of the unskilfulness of medical practitioners; the imprisonment of the party brought on by the negligence of his attorney; all these would be breaches of the implied promise by the person employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the part of the executor to maintain an action in any such case. Where the damage done to the personal estate can be stated on the record, that involves a different question. Loss of marriage may, under circumstances, occasion a strictly pecuniary loss to a woman, but it does not necessarily do so; and unless it be expressly stated on the record, the Court will not intend it (*i*).

(*h*) 2 Lev. 26.

(*i*) *Per* Lord Ellenborough, C. J., *Chamberlain* v. *Williamson*, 2 M. & S. 408, 415.

Principle of damages.

Since then no action can be brought except in respect of injury to the personal estate, it follows that where an action is brought, damages can only be recovered on account of such injury. Accordingly in an action for distraining on the testator's goods, when no rent was due, and forcing him to pay 9*l.* 13*s.* to have the distress withdrawn, it was held that damages must be limited to the amount so paid (*k*).

Additional rights of action given by

Actions on a contract made with the deceased, or for a debt due to him, were always maintainable by the executor. But it was a principle of common law, that if an injury was done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person *to* whom, or *by* whom the wrong was done (*l*). Three remarkable changes in this rule have been made. Stat. 4 Edw. III. c. 7, enacts, that where any trespass has been done to the testators, as of the goods and chattels of the said testators carried away in their life, the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were living. By an equitable construction of this statute, an executor or administrator shall now have the same actions for any injury done to the personal estate of his testator in his lifetime, whereby it is become less beneficial to the executor, as the testator himself might have had, whatever the form of the action may be (*m*).

4 Ed. III. c. 7

3 & 4 W. IV. c. 42.

By stat. 3 & 4 W. IV. c. 42, s. 2, the executors or administrators may sue for any injury committed in the lifetime of the deceased to his real estate, so as such injury shall have been committed within six calendar months before the death, and provided the action is brought within one year after it. Even independently of this statute, however, where the defendant has severed part of the freehold, as trees, grass, or corn, and then carried it away, although the executor could not sue for the act of severance, he might sue for the taking of the severed chattel, by virtue of the stat. of Edw. III. (*n*).

(*k*) *Lockier* v. *Paterson*, 1 C. & K. 271.

(*l*) Wms. Exors. 743, 6th ed.

(*m*) 1 Wms. Saund. 217, b.; [1 Wms. Notes to Saund. 244]. The remedy given by this statute has been held to include administrators, and by 25 Ed. III. c. 5, was extended to executors of an executor, *ibid.*

(*n*) Wms. Exors. 746, 6th ed.; *Williams* v. *Breedon*, 1 B. & P. 330.

This mode would in many cases evade the limitation imposed by the later Act.

9 & 10 Vict. c. 93.

Stat. 9 & 10 Vict. c. 93, gives the executor or administrator of any person whose death has been caused by the wrongful act, neglect, or default of any other person, an action to recover damages in respect thereof, when the act is such as would (if death had not ensued) have entitled the party injured to sue. The action is to be for the benefit of the wife, husband, parent, and child of the deceased (*o*). And the jury may give such damage as they may think proportioned to the injury resulting from such death to the parties for whose benefit it is brought, and are to divide it among them by their verdict. In assessing damages under this Act, the jury are confined to the pecuniary loss sustained by the family, and cannot take into consideration the mental suffering of the survivors. This rule was laid down after much consideration in a comparatively recent case. The deceased who was 34, had an income, as a merchant, of 850*l.* per annum, which, according to the probable duration of his life, calculated by the government annuity tables, amounted to 13,188*l.*, of which the widow would have the joint enjoyment during his life. On the other hand, by his death she became at once entitled to 7000*l.*, leaving a balance of 6,138*l.* The judge directed the jury to consider as to the pecuniary loss, how much of her husband's income a wife living with him, and maintained according to her station in life, might be supposed to enjoy. He further told them, that if they considered the plaintiff entitled to any compensation for the bereavement she had sustained, beyond the pecuniary loss, they might allow for it. They gave a verdict for 4000*l.* A new trial was granted, on the ground of misdirection in allowing the jury to take the mental suffering of the plaintiff into their estimate, and because the damages were excessive supposing this element to be excluded (*p*). In a former case, the deceased was a labourer aged 33, and earning 1*l.* a week. Parke, B., directed

(*o*) See the interpretation clause [and *Dickinson* v. *N. E. Ry. Co.* 2 H. & C. 735. By 27 & 28 Vict. c. 95, s. 1, if there is no executor or administrator, or no action is brought within six months, the persons beneficially interested in the result of the action may sue.]

(*p*) *Blake* v. *Midland Ry. Co.*, 18 Q. B. 93; 21 L. J. Q. B. 233.

the jury not to consider the value of his existence as if they were bargaining with an annuity office, in which case they would have to take all possible accidents into account, but to give what they considered a reasonable compensation. They gave 100*l.* (*q*).

[The rule which has been laid down and adopted is that "legal liability alone is not the test of injury, in respect of which damages may be recovered under this statute; but the reasonable expectation of pecuniary advantage by the relative's remaining alive may be taken into account by a jury, and damages given in respect of that expectation, if it be disappointed and the probable pecuniary loss thereby occasioned" (*r*). Thus a parent may recover for the loss of the probability that his son would have continued to contribute to his maintenance (*s*); and children may recover for the loss of the education, comforts, and position in society, which they would have enjoyed if their father had lived and retained the income which died with him, and they had continued to reside with him; and even the probability that the deceased if he had lived would have made provision for his children may be considered (*t*). And the remedy given by the statute being to individuals and not to a class, the action is maintainable, though the income of the deceased arises from land and personalty, and is not lost to his family by his death, if in consequence of the death the mode of its distribution among the members is changed (*y*).

If no pecuniary damage is proved the defendants are entitled to the verdict (*z*). No damages can be recovered in respect of funeral expenses or mourning (*a*).]

It will be observed that this action will only lie under circumstances which would have admitted of its being main-

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(*q*) *Armsworth* v. *S. E. Ry. Co.* 11 Jur. 758.

[(*r*) *Dalton* v. *S. E. Ry. Co.*, 27 L. J. C. P. 227; 4 C. B. N. S. 296; *Franklin* v. *S. E. Ry. Co.*, 3 H. & N. 211; *Pym* v. *G. N. Ry. Co.*, 2 B. & S. 759; 31 L. J. Q. B. 249; affirmed 4 B. & S. 396; 32 L. J. Q. B. 377. The fact that the deceased's life was insured cannot be taken into account in assessing the damages; see *ante*, p. 67, and *Althorf* v. *Wolfe*, 2 Hilton, N. Y., C. P. 344; affirmed 22 N. Y. 355.]

[(*s*) *Dalton* v. *S. E. Ry. Co.*, *supra.*]

[(*t*) *Pym* v. *G. N. Ry. Co.*, *supra.*]

[(*y*) *Ib.*]

[(*z*) *Duckworth* v. *Johnson*, 4 H. & N. 653; 29 L. J. Ex. 25.]

[(*a*) *Dalton* v. *S. E. Ry. Co.*, *supra.*]

tained by the deceased, had he survived (*b*). It therefore [is barred by an accord and satisfaction with the deceased in his life time (*c*), and] will fail where the injury was the result of his own negligence (*d*). And it will equally fail where the party met his death while employed in the service of his master, in consequence of the negligence of a fellow servant, provided the latter was a proper person to be placed in the situation he filled (*e*).

Actions against an executor.

Where the action is brought against the executor, the amount of damages recoverable depends upon the character in which he is sued. Where he can only be sued in his representative character, he is in general only liable to the extent of the assets. On the other hand, where the action can be maintained against him in his individual capacity, he is personally responsible, just as any other defendant. Without attempting to give a detailed account of all the principles on this head, it may be advisable to point out the leading distinctions which prevail. With this view it will be convenient to consider, first the cases in which the defendant may be sued as executor; secondly, those in which he may be sued personally; thirdly, the mode in which he should protect himself by pleading, and the effect of a judgment against him.

When executor must be sued as such.

1. It was an old principle of the Common Law that such personal actions as were founded upon any obligation, contract, debt, covenant, or duty, on which the testator or intestate might have been sued in his lifetime, survived his death, and were enforceable against his executor or administrator to the extent of the assets (*f*). And accordingly an action for rent, incurred entirely in the lifetime of the testator, must be brought against the executor in his representative capacity (*g*); and he is not only liable upon all covenants of

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[(*b*) This has reference not to the nature of the loss sustained, but to the nature of the wrongful act complained of; *Pym* v. *The G. N. Ry. Co.*, *supra*.]

[(*c*) *Read* v. *G. E. Ry. Co.*, L. R. 3 Q. B. 555; 37 L. J. Q. B. 275.]

(*d*) *Tucker* v. *Chaplin*, 2 C. & K. 730; [*Pym* v. *G. N. Ry. Co.*, 2 B. & S. at p. 767.]

(*e*) *Hutchinson* v. *York, N. and B. Ry. Co.*, 5 Exch. 343; *Wigmore* v. *Jay*, *ibid.* 354; [*Wiggett* v. *Fox*, 11 Ex. 832; 25 L. J. Ex. 188.]

(*f*) 1 Wms. Saund. 216, b; [1 Wms. Notes to Saund. 240]; Wms. Exors. 1590, 6th ed.

(*g*) Wms. Exors. 1619, 6th ed.

the testator which have been broken in his lifetime, but also for breaches in his own time so far as he has assets. Thus if a tenant in tail leases for years, and dies, and the issue in tail ousts the termor, he shall have covenant against the executors, upon an express covenant for quiet enjoyment (*h*). And so upon an express covenant, as for instance, to pay rent, the executor of the lessee will be liable as far as he has assets, even though the term has been assigned over, and although the covenant runs with the land, so as to give an alternative remedy against the assignee (*i*). Where, however, the obligation arises out of an authority given by the deceased, it is in many cases revoked by the death, and no action can be maintained against the personal representative in respect of it. In a very recent case, the plaintiff had contracted with A., the intestate, to sell a picture, the property of the latter, for which service he was to receive 100*l.* A. died, and after his death the plaintiff succeeded in selling it. He then sued the administratrix for the 100*l.*, alleging that she had confirmed the sale. It was held that the declaration was bad, since the authority to sell was revoked by death, and the mere confirmation of the sale was not a confirmation of the original contract, upon which the sale had been effected. If the defendant had continued the employment, with full knowledge that under the agreement 100*l.* was to be paid to the plaintiff on the sale, that sum of 100*l.* might have been the gauge or measure by which the jury would estimate the plaintiff's damages, but no more. In the absence of such evidence, a mere confirmation of the sale would only make the defendant liable as upon an ordinary employment to sell (*k*).

When executor not liable.

An executor, however, is not liable on a contract which involved a matter of personal skill, as for instance on an undertaking by an author to write a book, or by an engineer to build a lighthouse. For this has become impossible by the death (*l*).

The same principles of common law which forbid actions by executors for torts, also forbid actions against them for a

(*h*) Fitz. N. B. 145 (E), n. (*a*).
(*i*) Wms. Exors. 1616, 6th ed.
(*k*) *Campanari* v. *Woodburn*, 15 C. B. 400; 24 L. J. C. B. 13.
(*l*) *Marshall* v. *Broadhurst*, 1 Tyrwh. 349; *per* Patteson, J. 10 A. & E. 45.

similar cause. The rule, however, has been broken in upon by statute: 3 & 4 W. IV. c. 42, s. 2, allows actions of trespass, or on the case to be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six months before the death, and so as such action shall be brought within six months after the executors, &c., shall have taken upon themselves the administration of the estate. But even independently of this statute, the plaintiff has it frequently in his power to waive the tort. Where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable at common law for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator he shall (*m*). An intestate had tortiously taken and sold coal, the property of the defendant; some of the trespasses were committed more than six months before his death. The plaintiff sued his administrators in trespass under the above statute for the wrongs done within the six months. He was then allowed to bring an action for money had and received for the coal sold previously, although no distinct evidence could be given of the amount received for it. The jury gave what they considered to be the value of the coal taken, deducting the expense of raising and conveying it to market (*n*).

3 & 4 W. IV. c. 42.

Vindictive damages not allowable against an executor.

Of course, in such an action against the executors, vindictive damages could not be given in respect of the malice of the original trespasser, or even, I should conceive, in respect of any insolent or violent behaviour while committing the injury, except so far as it caused pecuniary loss. No doubt the executor himself would not be affected by the amount of the verdict, as he would not have to pay it out of his own pocket. It might, however, be paid for out of the purses of the creditors, which would be most unjust, and, in any case it would be making the legatees and next of kin suffer for the motives and insolence of another party.

(*m*) *Per* Lord Mansfield, *Hambly* v. *Trott*, 1 Cowp. 371, 376.
(*n*) *Powell* v. *Rees*, 7 A. & E. 426.

Actions against executors for dilapidations.

An anomalous exception to the principle that actions for tort do not survive, is the action for dilapidation against the executor of a deceased incumbent. This has been explained by Willes, C. J., on the ground that it is not considered as a tort in the testator, but a duty which he ought to have performed; and therefore his representatives, so far as he left assets, shall be equally liable as himself (*o*). But it is now agreed that it is an anomalous action, based upon a particular custom of the realm, and not upon the common and ordinary principles of the law of England (*p*). The remedy is not merely for dilapidations happening in the time of the last incumbent, but for the dilapidations existing at the time his incumbency ceases; for he was bound to keep the vicarage in sufficient repair, or to make compensation to the extent of putting it in repair, and he had the same remedy against the representatives of his predecessor, if he chose to employ it (*q*). Two propositions have been laid down as to the amount of repair:—first, that the incumbent is bound, not only to repair the buildings belonging to his benefice, but also to restore and rebuild them if necessary; secondly, that he is bound only to repair, and to sustain, and rebuild, when necessary. He is bound to maintain the parsonage, (which must be assumed to be suitable in point of size, and in other respects, to the benefice), and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing, and papering belong. It is upon this footing that damages are to be estimated (*r*). If the state of the vicarage be such that timber or stone could be got for the necessary repairs, that would go in diminution of damages, but it is only a

(*o*) *Sollers* v. *Lawrence*, Willes, 421.

(*p*) *Bryan* v. *Clay*, 1 E. & B. 38; [*Ross* v. *Adcock*, L. R. 3 C. P. 655; 37 L. J. C. P. 290.]

(*q*) *Per* Parke, B., *Bunbury* v. *Hewson*, 3 Exch. 558, 562.

(*r*) *Per* Cur. *Wise* v. *Metcalfe*, 10 B. & C. 299, 316. [The right to recover is confined to dilapidations to houses and buildings, and does not extend to waste by digging gravel; *Ross* v. *Adcock*, L. R. 3 C. P. 655; 37 L. J. C. P. 290. As to hot-houses, see *Martin* v. *Roe*, 7 E. & B. 237; 26 L. J. Q. B. 129.]

circumstance to be taken into consideration in estimating the sum payable by way of compensation (*s*).

Contracts made with executors as such.

There are also some cases in which the executor is in form sued upon a contract made with himself, and yet the action charges him in his representative capacity only, and the judgment can only be for payment out of the assets. This is so, where the action is for money paid by the plaintiff to the use of the defendant, *as executor* (*t*). That imports that the plaintiff has paid it, not on the personal account of the defendant, but because he was executor; that is, in release of something which would otherwise have been a burden on the assets of the testator. And the case is the same where the count is on an account stated between the plaintiff and the defendant *as executor*, of money due from the testator to the plaintiff (*u*); or of money due from the defendant as executor, to the plaintiff, for the only proof admissible in support of such a cause of action would be an account stated respecting debts due from the testator himself (*x*).

Actions against executor personally.

2. In all the above cases, as we have seen, the executor is only liable as holding the property of the testator, and the judgment could only be *de bonis testatoris*. There are, however, many cases in which the executor is liable personally, whether he has got assets or not.

Contract made by him.

The most obvious of these cases is where he is charged upon a contract made with himself, or an obligation thrown upon himself, subsequently to the death of the testator. For instance, on a count for money lent to himself (*y*), or for money had and received by himself, as executor, for the use of the plaintiff. Where an executor receives money to the use of a particular individual, it operates as a specific appropriation of that money belonging to the party, and he, in his individual capacity, must be liable for the money so received. It has nothing to do with the accounts of the testator. If it be the plaintiff's money, he is entitled to it, whether there be assets

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(*s*) *Bunbury* v. *Hewson, ubi sup.*

(*t*) *Ashby* v. *Ashby*, 7 B. & C. 448, 449, 451, 452; *Corner* v. *Shew*, 3 M. & W. 350.

(*u*) *Segar* v. *Atkinson*, 1 H. Bl. 102.

(*x*) *Ashby* v. *Ashby*, 7 B. & C. 451; and see *Dowse* v. *Coxe*, 3 Bingh. 20; 6 B. & C. 255; *Powell* v. *Graham*, 7 Taunt. 580.

(*y*) *Rose* v. *Bowler*, 1 H. Bl. 108; *Powell* v. *Graham*, 7 Taunt. 586.

or not, and whether the executor have or have not applied to other purposes the money so received (*z*). So where the count is on an account stated with the executor of money received by himself personally (*a*), or for goods sold and delivered to the defendant as executor, or for work and labour performed and materials supplied to the defendant as executor, because these necessarily imply debts due from the defendant in his own right (*b*).

Trading.

So if executors carry on trade, they must do it as individuals, and for their own advantage (*c*), and they will be personally responsible on all contracts entered into by them, even though they do not receive anything for themselves, but carry over the receipts to the account of the next of kin, for whose benefit the trade is continued (*d*).

Effect of a submission to arbitration.

A submission to arbitration by an executor is a reference not only of the cause of action, but also of the other question whether or not the executor has assets. Therefore, where the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between those parties that the executor has assets. The defendant is concluded by the award, and cannot plead *plene administravit* (*e*). But it is different where the arbitrator has merely awarded that a certain sum is due from the estate, without awarding that the executor is to pay it, for this amounts to no admission of effects; or where he directs the defendant to pay it out of the assets, on a fixed day, for this means if there are any assets in his hands at that time (*f*).

Liability of executor for funeral expenses.

A good deal of doubt has been raised as to the liability of an executor for funeral expenses. The result of the decisions seems to be, that where the executor has personally ordered the funeral, he is personally responsible whether there be

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(*z*) *Ashby* v. *Ashby*, 7 B. & C. 451, 453.

(*a*) 7 Taunt. 586.

(*b*) *Corner* v. *Shew*, 3 M. & W. 350.

(*c*) *Per* Lord Mansfield, 1 T. R. 295.

(*d*) *Wightman* v. *Townroe*, 1 M. & S. 412. [They may sue as executors if the money recovered would be assets; *Abbott* v. *Parfitt*, L. R. 6 Q. B. 346; 40 L. J. Q. B. 115; *Moseley* v. *Rendell*, L. R. 6 Q. B. 338; 40 L. J. Q. B. 111.]

(*e*) *Worthington* v. *Barlow*, 7 T. R. 453; *Barry* v. *Rush*, 1 T. R. 691; *Riddell* v. *Sutton*, 5 Bingh. 200.

(*f*) *Pearson* v. *Henry*, 5 T. R. 6; *Love* v. *Honeybourne*, 4 D. & Ry. 814.

assets or not (*g*), and cannot, even out of the assets, as against a creditor, retain more than a reasonable amount, regard being had to the degree and condition in life of the deceased (*h*.) Even where the executor gives no order for the funeral, he is liable for a reasonable amount, *if he has assets*, upon an implied promise; and where he is liable at all in this matter, he is liable personally, and not in his representative character, inasmuch as the implied promise cannot place him in a different condition from that in which he would have been if he had made an express contract to that effect, which certainly would only have bound him personally (*i*). Where, however, the executor has not ordered the funeral, and it has been furnished, not upon his credit, but upon that of some other person, he is not liable primarily to the undertaker; but if he had assets, he is liable to repay the reasonable expenses so incurred by the party who has defrayed them (*k*).

Use and occupation.

It has been held that an action for use and occupation of land by executors as such makes them personally liable (*l*). But it appears that this is not invariably so. It has been pointed out that the stat. 11 Geo. II. c. 19, s. 14, allows landlords to maintain this action for lands held *or* occupied by the defendant. Consequently, a decision which alleged a demise to the testator, and then, without stating any entry by the defendants, averred that they, as executors, promised to pay the rent, was held good. Maule, J., said, "I think it discloses a sufficient cause of action against the defendants in their representative capacity. It in terms so charges them; for it means that the plaintiff is seeking to charge them in respect of the assets of their testator. It is probable that they may be so liable. If the testator held the premises, and if the defendants, since his decease have not actually occupied, but have held only, and rent has accrued, they would not be personally liable, but the assets in their hands would be liable" (*m*).

(*g*) *Brice* v. *Wilson*, 8 A. & E. 349, n.

(*h*) *Hancock* v. *Podmore*, 1 B. & Ad. 260; [*Edwards* v. *Edwards*, 2 C. & M. 612.]

(*i*) *Rogers* v. *Price*, 3 Y. & J. 28; *Hayter* v. *Moat*, 2 M. & W. 56; *Corner* v. *Shew*, 3 M. & W. 350; [*Magennis* v. *Dempsey*, I. R. 3 C. L. 327.]

(*k*) *Brice* v. *Wilson*, *ubi sup.*; *Green* v. *Salmon*, 8 A. & E. 348.

(*l*) *Wigley* v. *Ashton*, 3 B. & A. 101.

(*m*) *Atkins* v. *Humphrey*, 2 C. B. 654, 658.

Actions for rent due since the death of the testator.

We have seen before, that actions for rent which became due in the lifetime of the testator, must be brought against the executor in his representative character, and the judgment can only be *de bonis testatoris* (*n*). When a lease to the testator devolves upon the executor, and rent becomes due after the death, the lessor, whether he sues in debt or on the covenant to pay rent, has his election either to sue him as executor, or to charge him personally as assignee in respect of the perception of the profits (*o*). And if he selects the latter course, it seems to be immaterial whether the executor has entered or not, because the fact of his being executor proves the allegation that the estate of the lessee in the premises lawfully came to the defendant (*p*). The result to the executor in either case is the same, though it may involve a different mode of pleading. Where an executor is sued in his representative capacity for rent accruing in his own time, whether the action be debt, covenant, or use and occupation, he may plead *plene administravit;* and, under that plea, may show that the land yields no profit, and that he has no assets *aliunde;* but if the land yields a profit equal to the rent, he will fail on such a plea, for he is bound to apply the profits of the land towards payment of the rent in the first instance, and his not doing so will be a *devastavit.* If, then, the land yields some profit, but less than the rent, it should seem that his plea should be *plene administravit præter* the profit (*q*). Where, however, the executor is sued in his individual capacity, as assignee, for rent subsequently incurred, he cannot plead *plene administravit,* even although he be named as executor in the declaration; for if the rent be of less value than the land, as the law *primâ facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and, therefore, the plea would confess a misapplication, since no other payment out of the profits can be justified till the rent is answered (*r*). The same effect will be attained by a special plea, for the defendant

(*n*) *Ante*, p. 394.
(*o*) 1 Wms. Saund. 1; [1 Wms. Notes to Saund. 1.]
(*p*) *Williams* v. *Bosanquet*, 1 B. & B. 238; *Wollaston* v. *Hakewill*, 3 M. & G. 297.
(*q*) 1 Wms. Saund. 111, a; [1 Wms. Notes to Saund. 126]; *Lyddall* v. *Dunlapp*, 1 Wils. 4; *Wilson* v. *Wigg*, 10 East, 313.
(*r*) *Buckley* v. *Pirk*, 1 Salk. 317; Wms. Exors. 1622, 6th ed.

may discharge himself from personal liability, by alleging that he is not otherwise assignee than by being executor of the lessee, and that he has never entered or taken possession of the demised premises; and from all liability as executor, by alleging that the term is of no value, and that he has no assets (*s*). Where there are profits, but to a less extent than the rent, the executor must confess that part, and plead to the remainder of the action the deficiency of assets (*t*).

Where the term has been assigned.

If the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him; but still he will be liable in debt for the rent, unless the lessor has accepted the assignee as his tenant, and even in that case the executor will be liable, as executor, in covenant. If the executor enters, and afterwards himself assigns the lease, then he is chargeable as assignee, for that time only during which he occupied. And if he is sued for rent incurred since the assignment by himself, he is liable in his representative character only (*u*).

How the profit accruing from the land is to be estimated.

Since then the amount of damages which can be recovered against the executor in an action for rent, depends so much upon the amount of profit arising out of the premises, it is important to inquire upon what principles this profit is estimated. For this purpose, it is not sufficient to show that no profit was received by the executor, unless he can also show that no profit could have been received by the exercise of reasonable diligence. Therefore, where the testator was lessee of premises at a rent of 90*l.* per annum, and after his death the defendant made every effort to let them at the rent reserved, but failed to do so, and never occupied the premises himself, nor derived any rent or profit from them; the jury, however, found that he might have let them for 60*l.*: it was held that he was liable to this extent (*x*). In a former case it appeared that the lease to the testator contained a covenant to repair. He had underlet with a similar covenant. The under-lessee allowed the premises to get into such disrepair

(*s*) *Per* Tindal, C. J., *Wollaston* v. *Hakewill*, 3 M. & G. 321; [*Kearsley* v. *Oxley*, 2 H. & C. 896.]

(*t*) *Rubery* v. *Stevens*, 4 B. & Ad. 241.

(*u*) Wms. Exors. 1624, 6th ed.; 1 Wms. Saund. 111, a; [1 Wms. Notes to Saund. 127]; *Helier* v. *Casebert*, 1 Lev. 127; *Leigh* v. *Thornton*, 1 B. & A. 625; *Wilson* v. *Wigg*, 10 East, 313.

(*x*) *Hopwood* v. *Whaley*, 6 C. B. 744.

that they were nearly worthless, and ultimately became insolvent, and ceased paying rent. The Court held that these facts were no defence in an action against the executor. The real value, as against one who takes to the premises, and accepts rent for them after the death of his intestate, must be taken to be that which the premises would have been worth but for his own act. If he had performed the covenant to repair, which he was liable to do, the premises would have been worth at least as much as the rent. He cannot take advantage of his own wrong, by availing himself of a reduction in value, occasioned solely by the want of repair in his own time. As to the nonpayment of rent by the underlessee, the plaintiff has nothing to do with it. The value of the premises, as between him and the defendant, is not affected by that (*y*).

But although the executor is bound to apply the profits of the land in payment of rent, this rule, it seems, only applies to the case of yearly profits issuing out of the land, and not to money arising from the sale of land which he has disposed of (*z*). Nor can any statement by the testator, as to the value of his property, be any ground for charging the executors with such value, if contained in deeds to which they are not parties (*a*).

Covenant to repair.

Where, however, the action against the executor is brought on a covenant to repair, his liability prevails to the same extent as that of any other assignee, and a plea that the premises had yielded no profit since the testator's death, is bad on general demurrer (*b*).

Effect of a devastavit at law;

The last case I shall notice in which the executor is personally liable is where he has committed any act amounting to a *devastavit* (*c*). Upon this point there is a difference between the doctrines of Law and Equity, which may, perhaps, now be taken advantage of under the clauses of the Common Law Procedure Act, 1854, which enable equitable

(*y*) *Per* Cur. *Hornidge* v. *Wilson*, 11 A. & E. 645, 655.

(*z*) *Collins* v. *Crouch*, 13 Q. B. 542. *Quære*, Might not the money be taken as representing the land, so as to make the *interest* upon it amenable to the claims of the lessor?

(*a*) *Rowley* v. *Adams*, 2 H. L. Ca. 770.

(*b*) *Tremeere* v. *Morison*, 1 Bingh. N. C. 89; affirmed, *Hornidge* v. *Wilson*, 11 A. & E. 645; [*Sleap* v. *Newman*, 12 C. B. N. S. 116.]

(*c*) See as to what constitutes a *devastavit*, Wms. Exors. 1658, 6th ed. *et seq.*

defences to be set up. At law, it has been stated by Lord Ellenborough, that no case has decided that an executor, once become fully responsible by actual receipt of a part of his testator's property, for the due administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable expectation disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees in cases of loss without negligence on their part (*d*).

in equity.

But in Equity an executor will be relieved against a bond or other claim upon his testator, brought up against him after the assets have been accidentally destroyed, as by fire, or theft, where there has been no delay or negligence upon his part (*e*). Nor will he be held responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, or to whom it may have been necessarily entrusted in the course of business, so long as he himself exercises a reasonable diligence, and acts strictly within the line of duty. But if he omits to sell property when it ought to be sold, or leaves money due upon personal security, and a loss ensues; or if he has himself been the author of the improper investment; or has without necessity entrusted the assets to a person in whose hands they are subsequently lost, he will be held liable, even where that person is his co-executor or co-administrator (*f*). It is also the duty of an executor, as of any other trustee, to keep the property with which he is entrusted separate from his own; and where he mixes the assets with his own funds, he will be strictly responsible for any loss that may ensue (*g*).

Proper mode of pleading by an executor.

3. Where the executor is sued upon any cause of action where the judgment will be *de bonis testatoris*, and he has not assets to satisfy it, he should plead accordingly. For a judg-

(*d*) *Crosse* v. *Smith*, 7 East, 258.

(*e*) *Holt* v. *Holt*, 1 Cha. Ca. 190; *Lady Croft* v. *Lyndsey*, 2 Freem. 1; *Jones* v. *Lewis*, 2 Ves. Sen. 240.

(*f*) *Clough* v. *Bond*, 3 Myl. & Cr. 490, 496; *Robinson* v. *Robinson*, 1 De G. M. & G. 247.

(*g*) *Freeman* v. *Fairlie*, 3 Mer. 29, 43; *Clarke* v. *Tipping*, 9 Beav. 292; *Massey* v. *Banner*, 4 Madd. 413.

ment against him, whether by default or upon demurrer, or upon a verdict on any plea except *plene administravit*, or *plene administravit præter*, is conclusive against him that he has assets to satisfy such judgment (*h*). But upon the two last-named pleas the onus of proving assets lies upon the plaintiff, and a judgment against him upon them, is only an admission of assets to the amount proved to be in his hands (*i*).

Judgment against him.

Whenever the action against an executor or administrator can only be supported against him in that character, and he pleads any plea which admits that he has acted as such (except a release to himself), the judgment against him must be, that the plaintiff do recover the debt and costs to be levied out of the assets of the testator, if the defendant has so much, but if not, then the costs out of the defendant's own goods. As where the defendant pleads *non est factum testatoris*, or a release to the testator, or payment by him, or *non assumpsit*, or *plene administravit*, which is found against him (*k*). But where the defendant pleads *ne unques executor* or *administrator*, or a release to himself, and it is found against him, the judgment is, that the plaintiff do recover both the debts and costs *de bonis testatoris si, &c., et si non, de bonis propriis*. The reason alleged is, that the executor cannot but know these to be false pleas. But it has been justly observed that the same reason applies equally to other pleas where the judgment is different (*l*). If, however, the defendant has pleaded any other plea, which goes to the whole cause of action, and is found for him, he is protected (*m*).

Except, however, where the judgment against the defendant is on a plea of *plene administravit*, which as we have seen is only conclusive to the amount of assets proved to exist, it is really a matter of small importance to the executor how the judgment is entered up. It only serves to postpone his fate by a single stage. The judgment is an admission of assets to satisfy it. Therefore, to a *scire facias* founded upon it, or an

(*h*) 1 Wms. Saund. 219, b; [1 Wms. Notes to Saund. 249.]

(*i*) *Ibid.; Jackson* v. *Bowley*, Car. & M. 97; *Yardley* v. *Arnold, ibid.*, 434; *Stroud* v. *Dandridge*, 1 C. & K. 445.

(*k*) 1 Wms. Saund. 335, n. 10; [1 Wms. Notes to Saund. 605, n. 10; 2 Wms. on Exors. 1823, 6th ed.; *Gorton* v. *Gregory*, 3 B. & S. 90.]

(*l*) 1 Wms. Saund. 336, b.; [1 Wms. Notes to Saund. 610.]

(*m*) *Edwards* v. *Bethel*, 1 B. & A. 254.

action of debt suggesting a *devastavit*, the executor cannot plead *plene administravit*, but only controvert the *devastavit*; of which fact the judgment, and the sheriff's return of *nulla bona testatoris*, are almost conclusive evidence, and judgment will be against the defendant *de bonis propriis* (*n*).

Of course where judgment is given against the executor in his individual capacity, it must be from the very first *de bonis propriis*, and the testator's assets are not liable at all. This is occasionally a very great hardship, where the plaintiff's claim really arises out of something done for the benefit of the estate, which may be perfectly solvent, though the executor personally may be worth nothing (*o*).

II. Actions by [Trustees] in Bankruptcy.

[Under the Bankruptcy Act, 1869, the property of a bankrupt divisible among his creditors is now administered by a trustee appointed by the creditors and acting under their direction. The property vests in him on appointment, and comprises all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, or acquired by or devolving on him during its continuance. It does not comprise property held by the bankrupt in trust for other persons (*p*). It would seem that the following observations, based upon decisions respecting the rights and duties of assignees under former Acts, may be made with regard to trustees under the Act now in force.]

Principle upon which trustees of bankrupt may sue.

Actions by [trustees] in bankruptcy stand very much on the same footing as those by executors, except that the rights of the latter are not so limited as those of the former; for the executor represents the deceased as to all his contracts and personal rights, whether they are available as assets for the payment of his debts or not; but [the trustee] takes only those beneficial matters belonging to the bankrupt's estate which may be applied for the purpose of distribution amongst his creditors (*q*). Consequently the right of action, and therefore the amount of damages recoverable, depends upon the existence and degree of loss to the estate of the bankrupt.

This question was so exhaustively discussed in the case of

(*n*) 1 Wms. Saund. 219, c. 337; [1 Wms. Notes to Saund. 251.]
(*o*) See *Ashby* v. *Ashby*, 7 B. & C. 449.
[(*p*) Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, s. 15.]
(*q*) *Per* Williams, J., 2 H. L. Ca. 596.

Beckham v. *Drake*, which ascended from the Court of Exchequer to the House of Lords, that it will be necessary to do little more than refer to that case and quote some passages from it. The plaintiff had been engaged as foreman by the defendants at a certain salary for seven years, either party making default in their share of the contract to pay the other 500*l.* The plaintiff sued for breach of this contract after his bankruptcy, the defendants pleaded bankruptcy, and the plea was finally held to be a good one, on the ground that the right of action passed to the assignees (*r*).

Cases in which they may sue.

The general principle is, that all rights of the bankrupt which can be exercised beneficially for the creditors do so pass, and the right to recover damages may pass though they are unliquidated.

Not for a mere personal injury,

This principle is subject to exception. The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind, or character, and without immediate reference to his rights of property. Thus the [trustee] cannot sue for breach of promise of marriage, seduction, defamation, battery, injury to the person by negligence —as by not carrying safely, not curing, not saving from imprisonment by process of law; even though some of these causes of action may be followed by a consequential diminution of the personal estate, as where by reason of a personal injury a man has been put to expense, or has been prevented from earning wages or subsistence; or where by the seduction the plaintiff has been put to expense (*s*); also the right of action does not pass in respect of wages earned by the bankrupt upon a hiring after the bankruptcy; also the right of action cannot be made to pass to the [trustee] in respect of contracts uncompleted at the time of the bankruptcy, by their adoption and completion thereof, where the personal service of the bankrupt is of the essence of the contract (*t*). But although a right of action for not marrying or not curing, in breach of an agreement to marry or cure, would not generally pass to the [trustee], a right to a sum of money, whether ascertained

unless there has been an agreement to pay money on account of it.

(*r*) *Beckham* v. *Drake*, 8 M. & W. 846; 11 M. & W. 315; 2 H. L. Ca. 579.
(*s*) *Per* Parke, B., 2 H. L. Ca. 626.
(*t*) *Per* Erle, J., 2 H. L. Ca. 603, 604.

or not, expressly agreed to be paid in the event of failing to marry or cure, would pass. The agreement of the parties that money shall be paid as compensation, makes the right to recover the money a part of the personal estate of the bankrupt, as much as a recovery, before the bankruptcy, of a judgment in an action for an injury to the person or character of the bankrupt, would do (*u*).

Trespass to land or goods in his possession.

So rights of action for trespass to lands or goods in the actual possession of a trader, do not pass to his [trustee] if he becomes bankrupt, because those rights of action are given in respect of the immediate violation of the possession of the bankrupt, independently of his rights of property, and are an extension of the protection given to his person, and the primary personal injury to the bankrupt is the principal and essential cause of action (*x*). But Wilde, C. J., in reference to this doctrine, said, "I apprehend that if the trespasser has done actual damage to the personal estate of the bankrupt, as well as committed a trespass on his possession, there is no authority which decides that assignees may not maintain an action in respect of the diminution in value, or injury to the chattels, that have passed to them under the bankruptcy" (*y*).

Nominal damages.

But although damages cannot be given for injuries which are merely personal to the bankrupt, it by no means follows that actions can only be brought where substantial damages can be recovered. Even where there is no actual damage proved, or where the damage is merely nominal for a breach of the contract, still if that is in respect either of property or of a proprietary right, such as service or work and labour, even in that case it passes (*z*).

When the final loss to the estate is the criterion of damages.

Where the gist of the action is the loss to the estate, of course the damages are measured by the loss which has accrued, or is likely to accrue at the time of action brought. The bankrupt had contracted for the purchase of iron, and given bills for the amount. The contract was broken by the

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(*u*) *Per* Maule, J., 2 H. L. Ca. 622.

(*x*) *Per* Cresswell, J., *ibid.* 613.

(*y*) *Ibid.* 634. [As to whether the bankrupt can sue for special damages resulting to himself, apart from the pecuniary damage resulting to his estate, see *Rogers* v. *Spence*, 12 Cl. & F. 700; *Hodgson* v. *Sidney*, L. R. 1 Ex. 313; 35 L. J. Ex. 182; *Morgan* v. *Steble*, L. R. 7 Q. B. 611].

(*z*) *Per* Lord Brougham, *ibid.* 640.

vendors while the bills were still current. Subsequently the purchaser became bankrupt and the bills were dishonoured, and after such dishonour his assignees sued for the non-delivery of the iron. At the time the contract was broken there was no difference between the contract and market-price. The plaintiffs claimed as damages the whole value of the iron, on the ground that their rights were the same as those of the bankrupt had been, at the time the contract was broken. That at that time he was entitled to recover the full value, since the bills were then current, and while current operated as payment. The Court, however, held that the parties were in the same situation as if no bills had been given, or the contract had not been to pay by bills. And, there being no difference shown between the market-price at the time of default and the contract price, the vendees could only have recovered nominal damages; no more, therefore, could the assignees (*a*). In another case, H. before his bankruptcy lent the defendant a phaeton on hire, and the latter by his negligence injured it. The phaeton had been hired by H. himself from a third party, to whom it was sent back, who repaired it and proved for the amount against the estate. It was held that the assignees might sue for breach of the contract to use the phaeton in a proper manner. Tindal, C. J., said, "As to the question of damages, if H. before his bankruptcy had done the necessary repairs himself, or had paid for them when done, he would undoubtedly have been entitled to the whole sum which was laid out; or if his estate had actually paid, or had been proved ever likely to pay, any part of the amount proved against it, such proportion would have been the measure of the damages sustained by the bankrupt's estate. But as there is no proof to this effect, the consequence appears to us to be, that the plaintiffs are entitled to nominal damages for the breach of a contract, on which they had the right to sue, and where no actual damage is proved" (*b*).

When it is not.

On the other hand, where a right to recover a specific sum has once vested in the bankrupt, as by breach of an agreement

(*a*) *Valpy* v. *Oakeley*, 16 Q. B. 941; 20 L. J. Q. B. 380. [So assignees for value suing in the bankrupt's name, but for their own benefit, have been held under similar circumstances to be only entitled to nominal damages; *Griffiths* v. *Perry*, 1 E. & E. 680; 28 L. J. Q. B. 204.]

(*b*) *Porter* v. *Vorley*, 9 Bingh. 93, 95.

to apply money to a particular purpose, or to return the proceeds of a bill, this right passes to the [trustee] unaffected by the subsequent bankruptcy; and it makes no difference that the money wrongfully retained by the defendant has in fact been applied by him in discharge of a debt due to himself from the bankrupt, so as to leave the whole amount of claims upon the estate the same as it would have been had the money been properly applied. The [trustee is] still entitled to recover the entire amount originally due (*c*). *A fortiori* will [he] be entitled, where the act complained of has caused a diminution in the bankrupt's estate; as, for instance, where the bankrupt lodged money with the defendants to apply in payment of his rent, and in consequence of their not applying it as directed, the landlord distrained his goods for the amount (*d*).

Right to sue for his personal labour.

The [trustee], as has been stated above, [has] no right to sue for the proceeds of the mere personal labour of the bankrupt, due after his bankruptcy (*e*); though, if a person in his situation should gain a large sum of money or considerable effects, then such money or effects would undoubtedly belong to his [trustee] (*f*). But this rule only applies to what may be strictly termed personal labour. Therefore, where the plaintiff was a furniture broker, and had been employed by the defendant in removing his goods, in the course of which employment the plaintiff procured vans, supplied packing cases, and employed five or six men in the packing, unpacking, and conveyance of the property; and likewise cleaned and repaired some furniture, and found materials for this purpose; it was held that his claim on this account was not a matter of personal labour, and that a payment to the assignees was good (*g*). The same decision was given where it appeared that the plaintiff was a medical practitioner, who had become bankrupt; afterwards, by an arrangement with a friend who had purchased his stock of medicines, he continued in possession of them on credit, carrying on his business as before, and was supplied with fresh

(*c*) *Hill* v. *Smith*, 12 M. & W. 618; *Alder* v. *Keighley*, 15 M. & W. 117. See the facts of these cases, *ante*, pp. 68, 69.

(*d*) *Hill* v. *Smith*, *ubi sup.*

(*e*) *Per* Lord Campbell, C. J., 2 H. L. Ca. 643; *Chippendall* v. *Tomlinson*, 4 Dougl. 318, 322, n.

(*f*) *Per* Buller, J., 7 East, 57, n.; *per* Lord Alvanley, *Hesse* v. *Stevenson*, 3 B. & P. 578.

(*g*) *Crofton* v. *Poole*, 1 B. & Ad. 568.

medicines on credit. The debt was contracted under these circumstances, the plaintiff attending the defendant, giving him the benefit of his skill, and furnishing the medicines which he thought necessary. The Court thought this came within the case of *Crofton* v. *Poole*, and that it would be extending the principle laid down in *Chippendall* v. *Tomlinson* far beyond what was reasonable to apply it to such a state of things (*h*).

Right of action of wife.

[When a right of action of a bankrupt's wife is of such a character that if vested in the bankrupt alone it would have passed to his trustee, the bankrupt's interest in it passes to the trustee (*i*).

Bankruptcy of partner.

It was held that a partner might sue jointly with the assignees of a bankrupt partner to recover the proceeds of bills belonging to the partnership fraudulently indorsed by the bankrupt in satisfaction of his private debt to a person aware of the fraud (*k*).]

III. Actions by Principal against Agent.

When an action lies.

Whenever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority or by positive misconduct, or by mere negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage thereby falls on his principal, he is responsible for it, and bound to make a full indemnity. In such cases it is wholly immaterial whether the loss or damage be direct to the property of the principal, or whether it arise from the compensation which he has been obliged to make to third parties in discharge of his liability to them, for the acts or omissions of his agent. The loss or damage need not be directly or immediately caused by the act which is done, or which is omitted to be done. It will be sufficient if it be fairly attributable to it, as a natural result, or a just consequence. But it will not be sufficient if it be merely a remote consequence, or an accidental mischief; for in such a case, as in many others, the maxim applies, *Causa proxima, non remota, spectatur*. It must be a real loss or actual damage, and not merely a probable or possible one. Where the breach of

(*h*) *Elliot* v. *Clayton*, 16 Q. B. 581.

[(*i*) *Richbell* v. *Alexander*, 10 C. B. N. S. 324; 30 L. J. C. P. 268.]

[(*k*) *Heilbut* v. *Nevill*, L. R. 4 C. P. 354; 38 L. J. C. P. 273; affirmed in Ex. Ch. L. R. 5 C. P. 478; 39 L. J. C. P. 245.]

duty is clear, it will, in the absence of all evidence of other damage, be presumed that the party has sustained a nominal damage (*l*).

The above principles, quoted from the work of an eminent judge, are in fact equally applicable to any other case where compensation is sought for a breach of contract, and present an accurate summary of the general theory of damages. Another rule, however, must be added, which we have seen before applies also to the case of sheriffs and attornies (*m*), viz., that even though a breach of contract is proved, still if its performance could have been of no possible benefit to the plaintiff, and therefore its non-performance could have caused him no possible injury, the action will altogether fail. A few cases in illustration of each of these points will be sufficient upon this branch of the subject.

When a loss has arisen from his negligence.

If an agent should knowingly deposit goods in an improper place, and a fire should accidentally take place, by which they are destroyed, he will be responsible for the loss (*n*). And so where a barge, upon which the plaintiff's goods were placed, deviated from her course, and during the deviation a tempest occurred, in consequence of which she was lost, it was held that the owner of the barge was liable for the value (*o*). In both of these cases the fire and the tempest might equally have caused the loss had the defendant performed his duty. But Tindal, C. J., stated the answer to the objection to be, that no wrong-doer shall be allowed to qualify or apportion his own wrong, and that as a loss has actually happened while his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. It might admit of a different construction, if he could show, not only that the same loss might have happened, but that the same loss must have happened if the act complained of had not been done. So where a party has undertaken to insure goods, and has neglected to insure them altogether (*p*), or has insured them so negligently, that the

(*l*) Story, Agency, § 217, c.
(*m*) *Ante*, pp. 355, 359.
(*n*) Story, Agency, § 218; *Caffrey* v. *Darby*, 6 Ves. 496.
(*o*) *Davis* v *Garrett*, 6 Bingh. 716.
(*p*) *Ex parte Bateman*, 20 Jur. 265; 25 L. J. Bankr. 19.

plaintiff cannot recover against the underwriters, he will be liable for all the loss that has actually happened (*q*). Accordingly where a broker, employed to effect insurances, omitted to communicate a material letter, in consequence of which the assured failed in actions against some underwriters, and offered the broker the defence of others; and on his refusal, without further consulting him, made restitution to others who had paid the losses without suit, it was held that the assured might recover against the broker as well the amount of the losses so repaid, as of those which he had never recovered (*r*). And so, where a party employed to buy goods of a particular quality for another, directs an agent to execute the commission, and he supplies goods of an inferior quality, in consequence of which the first party is sued by his employer, the measure of damages in an action by him against the sub-agent is the amount of damages and costs that he has been forced to pay. If the goods have been refused by the party who originally contracted to purchase them, the original agent will be required to undertake to assign the goods to his sub-agent, or to sell them and account to him for the produce (*s*).

Actual loss furnishes the measure of damages.

In all these cases the actual loss is the measure of damages, and this measure may vary accordingly to the time at which the action is brought. This point was a good deal discussed in a recent case, the facts of which have been very fully stated in an earlier chapter (*t*). There, as will be seen by reference to the statement given, the owners of the ship resisted the action by the charterers, on the ground that the damages to which they were entitled for breach of the agreement to insure, entered into with them by the charterers, were a liquidated amount, viz., the value of the freight which was to have been insured. In support of this doctrine, a judgment of Washington, J., was quoted. He says, "The law is clear, that if a

(*q*) *Mallough* v. *Barber*, 4 Camp. 150; *Park* v. *Hammond*, *ibid.* 344; Holt, 80; S. C., 6 Taunt. 495.

(*r*) *Maydew* v. *Forrester*, 5 Taunt. 615.

(*s*) *Mainwaring* v. *Brandon*, 8 Taunt. 202. [A broker negotiating a sale between seller and buyer, is not responsible for the quality, though employed by the purchaser to ship the cargo; *Zwilchenbart* v. *Alexander*, 1 B. & S. 234; 30 L. J. Q. B. 254, Ex. Ch. Recently, where an agent improperly parted with the possession of the goods of his principal, the latter recovered the whole value of the goods; *Stearine Co.* v. *Heintzmann*, 17 C. B. N. S. 56; and see *Matthews* v. *Discount Corporation*, L. R. 4 C. P. 228.]

(*t*) *Charles* v. *Altin*, 15 C. B. 46; 23 L. J. C. P. 197; *ante*, pp. 201, 202.

foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable not for damages merely, but as if he were himself the underwriter, and he is of course entitled to the premium" (*u*). But Jervis, C. J., said, "I think this is not the fair inference from what is there stated. It is not laid down that the broker, if guilty of negligence in effecting the insurance, becomes himself an insurer, and liable to pay the exact amount for which the insurance was or ought to have been effected, less the amount of premium. If so, what is the premium, which, as a matter of law, is to be deducted? It clearly must mean that the amount of the loss is the *reasonable*, not the ascertained *legal* measure of damages which the party is entitled to. That is, in effect, the principle upon which the damages would be ascertained here. If the broker has been guilty of negligence, it is but just and reasonable that the customer should recover against him the amount of the loss, deducting what would be paid for premiums; in other words, that he should be recompensed to the extent to which he has been damnified by his agent's negligence. But it is not a positive rule of law" (*x*). And Maule, J., in a judgment from which I have quoted before (*y*), pointed out that the action would lie at any moment after the negligence charged, and that the measure of damages might be a continually varying sum, according to the facts that had occurred up to the time the action was brought.

Damages must be the necessary result;

The damages must of course be the necessary result of the defendant's neglect of duty. Therefore, where the plaintiff had been nonsuited in an action against the underwriters, on the ground of concealment of material information, and claimed in the suit against his agent to include the cost of the action on the policy; Lord Eldon said that there was no necessity to bring that action to entitle the plaintiff to recover, and as it did not appear that the action on the policy was brought by the desire or with the concurrence of the

(*u*) *De Tastett* v. *Crousillat*, 2 Wash. C. C. R. 132.

[(*x*) 15 C. B. at p. 63. See also as to the measure of damages being not necessarily the whole amount of the insurance money, *Cahill* v. *Dawson*, 3 C. B. N. S. 106; 26 L. J. C. P. 253; *ante*, p. 202.]

(*y*) *Ante*, p. 201.

present defendant, he ought not to be charged with the costs of it (*z*).

and not be too remote.

The damages must also be the proximate and natural result of the neglect. Therefore, where an agent is directed to invest the funds of his principal in a particular stock, and he neglects to do so, and the stock thereupon rises, the principal is entitled to recover the enhanced value, as if the stock had been purchased. So, if an agent improperly withholds the money of his principal, he is liable for the ordinary interest of the country where it ought to be paid, and the incidental expense of remitting it, if it ought to be remitted. But he is not responsible for remote consequences that may accrue, such as loss of credit, or suspension of business by the principal, caused by the delay in payment (*a*). So, where an agent at Leghorn, having funds of his principal in hand, was directed to invest part of them in tiles and part in paper, and to ship the cargo for Havana; he invested the whole in paper, which, on the ship's arrival, sold at a loss, whereas the tiles would have realised a profit. The defendant claimed to have the damages estimated at the value of the money which ought to have been invested in tiles at Leghorn, and not at the value they would have sold for at Havana. The Court decided against him. They said this measure would only be correct if the breach of contract consisted in the nonpayment of the money, and not in the failure to invest that sum in tiles. Speculative damages, dependent on possible successive schemes, ought never to be given; but positive and direct loss, arising plainly and immediately from the breach of orders, may be taken into the estimate. Thus, in this case, an estimate of possible profits to be derived from investments at the Havana, of the money resulting from the sale of the tiles, taking into view a distinct operation, would have been to transcend the proper limits which a jury ought to respect; but the actual value of the tiles themselves, at the Havana, affords a reasonable standard for the estimation of the damages (*b*).

Nominal damages.

Breach of contract, *primâ facie*, involves a right to recover nominal damages, even though no actual loss is proved, or

(*z*) *Seller* v. *Work*, Marsh. Ins. 243, 4th ed.
(*a*) *Short* v. *Skipwith*, 1 Brock. 103; Story, Agency, § 220, 221.
(*b*) *Bell* v. *Cunningham*, 3 Peters, 69, 85.

even suggested; as, for instance, where the action was by a customer against a banker for dishonouring his cheque (*c*). In such a case, however, very lately substantial damages were given by a jury, and very fairly, because the injury to a man's credit may not be the less real, because it was not capable of proof (*d*). But when the agent can show that under no circumstances could any benefit to the principal have followed from obedience to his orders, and therefore that disobedience to them has produced no real injury, the action will fail. Therefore, if an agent is ordered to procure a policy of insurance for his principal, and neglects to do it, and yet the policy, if procured, would not have entitled the principal, in the events which have happened, to recover the loss or damage, the agent may avail himself of that as a complete defence. *A fortiori*, where the principal would have sustained a loss or damage, if his orders had been complied with. Accordingly, if the ship to be insured has deviated from her voyage; or the voyage or the insurance is illegal; or the principal had no insurable interest; or the voyage, as described in the order, would not have covered the risk; in all such cases, the agent, though he has not fulfilled his orders, will not be responsible (*e*). In estimating too the amount of benefit which might flow from the defendant's obedience to his orders, the Court will not take into consideration matters of mere speculation. Therefore where the plaintiff directed the defendant to effect an insurance on slaves, to which he was entitled in lieu of wages as mate on board a ship, and the ship was lost, it was held that he could not recover against the agent for neglect to insure the slaves, as not being an insurable interest. And it made no difference that in point of fact these slaves were frequently the subject of insurance at Liverpool, where the loss was always paid by the underwriters, without disputing the question. The Court were clearly of opinion that the plaintiff could not recover in this action, more than he could have recovered *in an action* against the underwriters (*f*).

When defendant may show that no loss could have taken place.

(*c*) *Marzetti* v. *Williams*, 1 B. & Ad. 415. [And see *Fray* v. *Voules*, 1 E. & E. 839; 28 L. J. Q. B. 232; *ante*, p. 360, n. (*y*).]

(*d*) *Rolin* v. *Steward*, 14 C. B. 595.

(*e*) Story, Agency, § 222.

(*f*) *Webster* v. *De Tastet*, 7 T. R. 157.

CHAPTER XVII.

PLEADING SPECIAL DAMAGE.

We may now pass from the principles which regulate the measure of damages, to the rules of pleading and practice in relation to them. This part of the subject naturally resolves itself into three heads, which I propose to consider in the three remaining chapters. The first has regard to what is required of the plaintiff, in stating and specifying the grounds of his claim. The second relates to the mode in which the jury must proceed in assessing damages under the various circumstances of the case; the consequences of any error into which they may fall, and the manner in which it may be rectified. Under the third head, I shall examine the power which the Court possesses to guide, alter, or review the verdict, particularly as to its amount.

The first head, taken in its full extent, would include nearly the whole science of pleading. Of course, the present inquiry is of a very much narrower nature, and relates only to the occasions on which damages must be specially pleaded, and the degree of minuteness required.

Special damage must be alleged when it is the essence of the action.

Special damage must always be expressly averred, and proved, when it is so much the gist of the action that without it no suit could be maintained; as, for instance, in an action against a returning officer at an election, for holding a scrutiny contrary to statute 6 & 7 Vict. c. 18, s. 82, whereby the plaintiff was delayed and hindered in his right of voting (*a*): or in an action by a master for the beating of his servant (*b*): or by a relation for the seduction of a female, *per quod*

(*a*) *Pryce* v. *Belcher*, 3 C. B. 58.
(*b*) *Mary's case*, 9 Rep. 113.

servitium amisit (*c*): or in cases of slander, where the words would not of themselves be actionable (*d*): or for a matter of general nuisance or injury to the entire public (*e*). In such a case as that last mentioned, the damage must be an actual tangible one to the plaintiff in reference to his existing interest. Therefore, where the action was for fixing an obstruction in a public navigable river, and impeding the access to a house abutting upon it, it was held not to be a sufficient allegation of special damage to say, that the plaintiff was reversioner, and had a right to the free navigation of the river for the enjoyment of the premises by his tenants, and so was injured in his reversionary interest. The Court said, "If, indeed, an obstruction of a public road appeared to be of a permanent nature, or professed, either by notice affixed, or in any other way, to deny the public right, and so led to an opinion that no road was there, the value of the house might be lowered in public estimation, and so pecuniary loss might follow, for which an action would lie. But that is a peculiar state of things, which ought to be distinctly set forth, and by no means arises from the naked fact that while the plaintiff's house was in the hands of his tenant, a public road had been obstructed by the defendant" (*f*).

It is not, however, necessary to state or establish particular instances of damage. Therefore a declaration for obstructing the access to the plaintiff's house, whereby divers persons who would otherwise have come to the house, and taken refreshment there were prevented, is sufficient without naming any one (*g*). And so in an action for fraudulently using the plaintiff's trade marks it is sufficient, at all events after verdict, to allege generally that by means of the fraud the plaintiff was deprived of the sale of divers large quantities of goods, and lost the profits that otherwise would have accrued to him therefrom. Maule, J., said, "It clearly is no ground for arresting the judgment that damage is alleged too generally" (*h*).

(*c*) See *ante*, p. 377.
(*d*) *Malachy* v. *Soper*, 3 Bingh. N. C. 371.
(*e*) *Dobson* v. *Blackmore*, 9 Q. B. 991; *Dimes* v. *Petley*, 15 Q. B. 276.
(*f*) 9 Q. B. 1004.
(*g*) *Rose* v. *Groves*, 5 M. & G. 613.
(*h*) *Rodgers* v. *Nowill*, 5 C. B. 109.

Special damage cannot be proved unless laid.

In all other cases, whether the action be on a contract or in tort, if the facts involve a legal injury, no actual damage need be stated (*i*). But then no damages, beyond those which the law infers, can be recovered for, unless they are specially stated. Under the old allegation of *alia enormia* in trespass, nothing could be given in evidence which could be stated with decency in the declaration (*k*). Accordingly, in an action of trespass and false imprisonment, the plaintiff was not allowed, without a special allegation, to prove that he was stinted in his allowance of food during his detention (*l*), or that his health had suffered from the confinement (*m*), or that he had been remanded by a magistrate (*n*). And so in an action for taking goods, where money has been paid to recover them, the payment ought to be alleged as special damage (*o*). *A fortiori*, matter which itself would be a distinct ground of action must be specially averred. Hence in an action on the case for an excessive distress, in which no mention occurred of any sale of the goods, the plaintiff was only allowed to recover damages in respect of the detention up to the time of the sale, and not in respect of the sale, though it appeared on the trial that the goods were sold for less than their real value (*p*). In one old case Lord Raymond took a distinction upon this point in actions of slander, between words which are actionable in themselves, and those which are only actionable with special damage. In the latter case, he said, that evidence of special damage is allowed, though the particular instances of such damage are not specified in the declaration; but in the former case, particular instances of special damage shall not be given in evidence, unless stated in the declaration (*q*); but this distinction is no longer recognised (*r*).

So in trover, special damage, to be recoverable, must be

(*i*) See *ante*, pp. 4—7.
(*k*) *Sippora* v. *Basset*, 1 Sid. 225.
(*l*) *Lowden* v. *Goodrick*, Peake, 46.
(*m*) *Petit* v. *Addington*, Peake, 62.
(*n*) *Holtum* v. *Lotun*, 6 C. & P. 726.
(*o*) Cowper, 418.
(*p*) *Thompson* v. *Wood*, 4 Q. B. 493.
(*q*) *Browning* v. *Newman*, 1 Strn. 666.
(*r*) 1 Wms. Saund. 243 d; [1 Wms. Notes to Saund. 322.]

specially laid (*s*). In contracts, too, there are certain damages which the law will presume; as, for instance, in an action for not delivering goods, that the plaintiff had to buy others at a loss; or in an action on a warranty, that the article really given was inferior to that which it was warranted to be. The extent of the loss must be proved; but no notice need be given of the species of loss which will be set up. But it is different where the injury complained of is of a merely secondary and consequential damage. As, for instance, that the plaintiff was sued for selling the same animal again, with a similar warranty (*t*); or that he incurred expense in investigating the title of the defendant to land, which the latter had contracted to sell, but could not, for want of title (*u*).

Statement of special damage must be as full as the case will admit of.

As the object of stating special damage is to let the defendant know what charges he must prepare to meet, the statement must always be as full and specific as the facts will admit of. Accordingly, in an action for an irregular distress, whereby the plaintiff had lost divers lodgers, without naming any, Lord Ellenborough rejected evidence that he had in fact lost one, because the name was not alleged, observing that the number was not so great as to excuse a specific description on the score of inconvenience (*x*). The same reason fairly applied to a general statement that a party had, in consequence of the alleged wrong, lost several suitors (*y*), or the sale of his lands (*z*); but the rule seems to be carried beyond just limits when it is said that an allegation that a party has lost divers customers is insufficient, because they ought to have been named (*a*). There is much more common sense in a later decision. The minister of a dissenting congregation alleged, that in consequence of the slanderous words of the defendant, "the said persons frequenting the said chapel have wholly refused to permit him to preach, and have withdrawn from him their countenance and support, and have discontinued giving him the gains and profits which they had usually

(*s*) See *ante*, p. 296.
(*t*) *Lewis* v. *Peake*, 7 Taunt. 153.
(*u*) *Hodges* v. *Earl of Litchfield*, 1 Bingh. N. C. 492.
(*x*) *Westwood* v. *Cowne*, 1 St. 172.
(*y*) *Barnes* v. *Prudlin*, 1 Sid. 396.
(*z*) *Lowe* v. *Harewood*, Sir W. Jon. 196.
(*a* *Hunt* v. *Jones*, Cro. Jac. 499; 1 Roll. Abr. 58; Bull. N. P. 7.

given, and would otherwise have given." Lord Kenyon held this sufficient, asking, how could he have stated the names of all his congregation? (*b*). The question would have been quite as difficult to answer, had it been asked in the former case.

Distinction between particular and special damage.

Possibly the real distinction may be that taken by Cresswell, J. (*c*), between particular and special damage, where he said, "In an action for slandering a man in his trade, when the declaration alleges that he thereby lost his trade, he may show a general damage to his trade, though he cannot give evidence of particular instances" (*d*). The great additional weight which the jury would lay upon one instance specifically proved, makes it only fair that notice should be given that the proof will be attempted. A mere general loss may well be announced in the same general way as that in which alone it can be proved. An action was brought for not performing a contract to let a house, whereby plaintiff had sustained loss, and been obliged to hire other premises at great cost and expense for rent and charges. It appeared that the premises, which were in Regent Street, had been taken for the millinery business, for which they were well suited, and that the plaintiff, not being suffered to occupy them, had sustained considerable loss from the passing by of the profitable season of the year. It was held that this evidence was admissible; Richards, C. B., said there was, in fact, no special damage as such proved. The object of the witness's testimony was to show that the plaintiff had suffered inconvenience. And Graham, B., remarked, that loss of customers, and general damage occasioned thereby, might have been given in evidence under the declaration, for it charges general loss, without specifying any particular individual whose custom had been lost; and it was competent to the plaintiff to show certain damage sustained by breach of the agreement, without stating his loss more specifically in the declaration (*e*).

(*b*) *Hartley* v. *Herring*, 8 T. R. 130.
(*c*) *Rose* v. *Groves*, 5 M. & G. 618.
(*d*) And see *Ashley* v. *Harrison*, 1 Esp. 48; *ante*, p. 369; [*Evans* v. *Harries*, 1 H. & N. 251; and *M'Laughlin* v. *Welsh*, 10 Ir. L. R. 19].
(*e*) *Ward* v. *Smith*, 11 Price 19.

Damages must be stated correctly.

The same principle which requires particularity of statement, also calls for accuracy of allegation. An action for a nuisance, resulting from an obstruction to a watercourse, stated that it was caused by the erection of a mound of earth by the defendants. It appeared that the mound of earth would not, of itself, have obstructed the water, but that it crumbled away and was trodden down, so as to cause the effect. It was held that the evidence did not support the declaration, as it alleged an immediate act of the defendants, whereas a consequential injury was all that was proved (*f*). And so in an action for false imprisonment, where it was laid as special damage that plaintiff had been forced to pay a large sum of money for costs, and the evidence was that he had employed an attorney, but not paid him; it was held that the damage was not proved. But the Court said, that as to the money which the attorney had actually laid out for him, the averment was sufficient, for a man might well say that he had been forced to pay, that which his agent had been forced to pay for him. In respect of the money advanced for him, he was in the same situation as if he had borrowed it to pay it over (*g*).

Interest.

As to the mode of declaring for interest, the reader is referred to the cases cited in the note (*h*).

Debt.

The mode of pleading with a view to damages in cases within the provisions of 8 & 9 W. III. c. 11, s. 8, has been noticed in the chapter on Debt (*i*).

(*f*) *Fitzsimons* v. *Inglis*, 5 Taunt. 534.

(*g*) *Pritchet* v. *Boevey*, 1 C. & M. 775; *Jones* v. *Lewis*, 9 Dowl. 143.

(*h*) Where the interest is part of the original debt, *Marshall* v. *Poole*, 13 East, 101; *Farr* v. *Ward*, 3 M. & W. 25; *Harrison* v. *Allen*, 2 Bingh. 4. Where it is subsequently stipulated for, *Hicks* v. *Mareco*, 5 C. & P. 498; or separable from the debt, *Dickenson* v. *Harrison*, 4 Price, 282. Debt for calls under a statute, *Southampton Dock Co.* v. *Richards*, 1 Sco. N. R. 219; 1 M. & G. 448. Common count for interest, *Nordenstrom* v. *Pitt*, 13 M. & W. 723.

(*i*) *Ante*, p. 165.

CHAPTER XVIII.

ASSESSMENT OF DAMAGES.

I. Actions against a single Defendant.

1. *Judgment by Confession, Reference to the Master, Writ of Inquiry.*
2. *Judgment by Default.*
3. *Judgment on Demurrer.*
4. *Several Counts on one Cause of Action.*
5. *Several Claims, where some are bad.*
6. *Misjoinder of Counts.*

II. Actions against several Defendants.

1. *Where there is a Verdict against all.*
2. *When some pay Money into Court.*
3. *When Judgment goes by Default, against all or some.*
4. *When they Plead severally.*
5. *When some Demur.*
6. *When there is a Verdict for some.*

III. When greater Damages are given than are claimed.

IV. Double and Treble Damages.

V. When an Omission by the Principal Jury may be supplied by a Writ of Inquiry.

We have now discussed all the preliminary steps necessary to a judgment for damages; the mode of pleading, the species of evidence that may be adduced, and the rules of law that ought to be laid down for the guidance of a jury. It now remains to consider the practical machinery by which the process is worked out.

Where the case comes on for open trial, the jury who try the cause, of course, assess the damages also, and there the matter ends. But the case may never be tried in open court at all, or only part of it may be so tried, or only some of the defendants. Various distinctions also may arise, according as the action is against one or several. It will be simpler first to examine the mode of assessing damages where the action is against one, and then to inquire into the further complications which may arise, where several defendants are joined.

Judgment by confession.

I. 1. The defendant may confess judgment. This he may do either by means of a cognovit given beforehand, authorising an attorney to confess judgment and mark execution against him for a particular amount, or by an express plea, in which he avows that he has no defence to the action, or by implication; as, for instance, where an executor pleads *plene administravit*, or *plene administravit præter*. In all these cases, where the form of the confession admits that an ascertained sum is due (*a*), judgment is final, and execution may issue at once for the amount. Where a cognovit was given for the payment of the money by instalments, and by the terms of the arrangement the plaintiff was not to be at liberty to enter up judgment, or issue execution unless default was made in payment of a certain sum, with costs, by instalments, it was held that on default being made in payment of any instalment, execution might issue for the whole amount, in the absence of express words to the contrary (*b*). But where the whole sum does not become due upon default in any instalment, execution may still be issued for each as it becomes due and remains unpaid (*c*).

Where the amount for which judgment can be signed is not ascertained, it will be necessary either to have a reference to a master, or to sue out a writ of inquiry.

When a reference to the Master will be allowed.

Till lately, the Courts were very strict in limiting the cases in which a reference to the master could be substituted for a writ of inquiry. They allowed it in actions upon bills of exchange, promissory notes, banker's cheques, covenant for non-payment of money, and the like, where it was only necessary to compute the amount of principal and interest due. But they refused it, where the action was on a bill of exchange for foreign money, or on a foreign judgment, or on a bond to save harmless, or on a covenant to indemnify, or on a bottomry bond, or for calls due on railway shares, or even in an action upon a judgment recovered on a bill of exchange where interest was sought for, or in an assumpsit for a certain sum due upon an agreement (*d*). Now, however, by the

(*a*) See Chit. Forms, 479, 7th ed.
(*b*) *Rose* v. *Tomblinson*, 3 Dowl. 49; *Barrett* v. *Partington*, 5 B. N. C. 487; *Leveridge* v. *Forty*, 1 M. & S. 706.
(*c*) *Davis* v. *Gompertz*, 2 Dowl. 407.
(*d*) Chit. Archb. 929, 9th ed.

Common Law Procedure Act, 1852, s. 94, "In actions in which it shall appear to the Court or a Judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry; but the Court or a Judge may direct that the amount for which final judgment is to be signed, shall be ascertained by one of the masters of the Court." It is plain that all the cases above mentioned could now be referred, and matters of even a more complicated nature seem to have been intended by the learned commissioners to be disposed of in the same way, the example given in their report being that of an action for damages for the non-repair of a house, or the like (*e*).

Evidence upon a writ of inquiry.

In all other cases a writ of inquiry must still be resorted to. The proceedings upon a writ of inquiry do not come within the plan of this work. As to the amount which may be recovered, I may observe that the plaintiff must always recover nominal damages, for the writ of inquiry assumes that the cause of action has been proved (*f*); therefore where the action is on a lease, the defendant is estopped from denying its execution (*g*). Nor can he object to the want of a stamp on the written contract (*h*). Nor prove absence of consideration for a bill or note (*i*). Nor can he show anything in mitigation of damages, which might have been pleaded; as, for instance, that he has a set-off (*k*), or that he has paid part of the demand (*l*). Nor need the plaintiff prove his interest in a policy of insurance (*m*), nor even produce the document; as, for instance, a bill of exchange, upon which he sues (*n*).

The state of things under which a writ of inquiry is brought, assumes not only that *a* cause of action, but that *the* cause of action laid by the plaintiff is proved. Where the amount claimed is such an essential part of the description of the

(*e*) 1st Rep. 411.
(*f*) *De Gaillon* v. *L'Aigle*, 1 B. & P. 368; [*Dods* v. *Evans*, 15 C. B. N. S. 621.]
(*g*) *Collins* v. *Rybot*, 1 Esp. 157.
(*h*) *Banbury Union* v. *Robinson*, Dav. & Mer. 92.
(*i*) *Shepherd* v. *Charter*, 4 T. R. 275.
(*k*) *Caruthers* v. *Graham*, 14 East, 578.
(*l*) *Lane* v. *Mullins*, 2 Q. B. 254.
(*m*) *Thellusson* v. *Fletcher*, 1 Doug. 316.
(*n*) *Lane* v. *Mullins*, 2 Q. B. 254.

cause of action, as to be a material and traversable statement, as for instance the amount of a bill of exchange, no evidence is required on the writ of inquiry (*o*) to entitle the plaintiff to recover it. But it is otherwise where the distinct sum claimed is not so laid as to be in issue. If a plaintiff declared for rent under a lease, laying the amount under a *viz.*, and judgment were suffered by default; if the rent appeared in evidence to be less than was alleged, the plaintiff would recover only the amount proved to be due (*p*). So in an action against a carrier for loss of goods, their value and the expense the plaintiff has been put to must be proved (*q*). Where the action was on a contract to purchase property at a certain large sum (to wit), the sum of 172*l.*, judgment went by default. The undersheriff ruled that the contract must be produced to entitle the plaintiff to more than nominal damages. When produced it turned out not to be stamped. He rejected it on this account, and there being no other evidence of the amount of loss incurred, ordered a verdict for nominal damages. The Court ruled that he was wrong in rejecting the instrument for want of a stamp; but on the other point, Patteson, J., said, "He thought there would be great difficulty in saying the undersheriff was wrong" (*r*). And so, although the amount of a bill may be recovered without producing it, interest upon it from maturity cannot (*s*). On the same principle, though judgment by default in an action for use and occupation admits that defendant occupied *a* house of the plaintiff's, he may show that he did not occupy the particular house with which the plaintiff is trying to fix him, but the onus of proof is on the defendant (*t*). So in an action for work and labour, defendant may show that all the amount charged for was not done at his request (*u*). And in an action for mesne profits, where judgment has gone by default, the

(*o*) *Lane* v. *Mullins, ubi sup.*
(*p*) *Per* Lord Denman, C. J., 2 Q. B. 923.
(*q*) *Livingston* v. *Douglas*, 2 Dowl. 630, n.
(*r*) *Banbury Union* v. *Robinson*, Dav. & M. 92, 97.
(*s*) *Hutton* v. *Ward*, 15 Q. B. 26; [*Doyle* v. *Duffy*, 6 Ir. L. R. 153, *contra.* In Byles on Bills, 434, 10th ed., it is said: "If interest be sought from a period before the issuing of the writ, it may be necessary to produce the bill."]
(*t*) *Davis* v. *Holdship*, 1 Chit. Rep. 644, n.
(*u*) *Williams* v. *Cooper*, 3 Dowl. 204.

plaintiff must prove the whole time during which the defendant was in possession, and in the absence of such proof can only obtain nominal damages (*x*).

On the other hand there are some cases in which the mere fact of the wrong done, without any proof of the express loss, might entitle the plaintiff to substantial damages. The jury, in such cases, as for instance on a writ of inquiry in an action of libel, may give such damages as they think fit, though no evidence is laid before them (*y*).

Judgment by default.

2. The defendant may let judgment go by default, either for want of appearance, or for want of a plea (*z*). In the former case, if the writ has been specially endorsed, the plaintiff may, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed, and a copy of the writ of summons, at once sign final judgment, and issue execution at the expiration of eight days from the last day for appearance (*a*). Where the writ has not been specially endorsed, he may, after complying with the above forms, file a declaration endorsed with a notice to plead in eight days; and in the event of no plea being delivered, judgment shall be final, if the nature of the claim is such that it might have been specially endorsed, and if the amount was endorsed upon the writ of summons (*b*). Where the defendant has not pleaded within the proper time judgment may be signed; and by the Common Law Procedure Act, 1852, s. 93, in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final. In cases which do not come within this description, the plaintiff will be driven to the alternative of a reference to the master, or a writ of inquiry as stated above.

Where there are several counts.

Where judgment goes by default, and there are several counts, on some of which a writ of inquiry would be necessary, and not on others, the plaintiff may have final judgment on such as do not require a writ, by entering a *nolle prosequi*, or *remittitur damna* as to the others. But such a course pre-

(*x*) *Ive* v. *Scott*, 9 Dowl. 993.
(*y*) *Tripp* v. *Thomas*, 3 B. & C. 427.
(*z*) See Chit. Archb. 916, 9th ed. [980, 12th ed.]
(*a*) C. L. P. Act, 1852, s. 27.
(*b*) *Ibid.*, s. 28.

cludes another suit for the same causes of action (*c*). Where, however, a declaration contains some counts on which a writ of inquiry is necessary, and a payment has been made generally upon the whole, a *remittitur damna* cannot be entered upon those counts, because damages have been received upon them; nor can a *nolle prosequi* be entered without the consent of the defendant. The plaintiff must execute the writ of inquiry (*d*).

It is no ground of error that the Court, on judgment going by default, first awarded a writ of inquiry, and afterwards assessed damages themselves. The inquiry is not a necessary step, but only a means of satisfying the conscience of the Court (*e*).

Or a plea as to part.

Where the defendant lets judgment go by default as to part of the declaration, and pleads to the rest, a special *venire* is issued, and the jury who try the issue assess damages for the whole (*f*).

Or a demurrer.

3. Where there is a demurrer to part of a declaration, and a default as to the rest, the plaintiff may either ascertain his damages definitely on the part unanswered, and contingently on that demurred to; or he may wait till the determination of the demurrer, and then obtain damages on both issues in the manner above stated (*g*). Or he may enter a *nolle prosequi* on the count demurred to, and take his damages on the other (*h*).

A judgment for the plaintiff upon demurrer is interlocutory or final, in the same manner and in the same cases as a judgment by default (*i*). And the same mode is to be pursued in assessing damages.

Issues of fact and law on same record.

Where there are issues of fact and law on independent pleadings, the plaintiff has in general the option which he will have tried first (*k*). This option, however, may be controlled by the Court, who will exercise their discretion, when the

(*c*) *Bowden* v. *Horne*, 7 Bingh. 716.
(*d*) *Jones* v. *Shiel*, 6 Dowl. 579.
(*e*) *Gould* v. *Hammersley*, 4 Taunt. 148.
(*f*) *Heydon's case*, 11 Rep. 5.
(*g*) Chit. Archb. 926, 9th ed.; [935, 12th ed.]
(*h*) *Milliken* v. *Fox*, 1 B. & P. 157.
(*i*) Chit. Arch. 870, 9th ed.; [933, 12th ed.]; Chitt. Forms, 472, 7th ed.; [497, 10th ed.]
(*k*) 2 T. R. 394.

decision of the law affects the damages or general aspect of the case (*l*). And by the Common Law Procedure Act, 1852, s. 80, where either party has pleaded and demurred to the same matter, it is in the discretion of the Court to order which issue of law or fact shall be disposed of first. *Disposed of*, relates to the tribunal in which the issue is first raised. The Court have no power to defer the trial of the issue in fact till the demurrer is taken to a Court of Error (*m*).

When the plaintiff is allowed to exercise his option, he may either assess damages contingently on the demurrer, at the trial of the issue of fact (*n*); or if he has already had judgment on the demurrer in his favour, may summon a jury *tam ad triandum quam ad inquirendum* (*o*).

If there is an issue of fact as to one part of the cause of action and a demurrer as to the other, which is decided in favour of the plaintiff, if he is content to take damages only on the judgment on the demurrer, he may execute a writ of inquiry upon it, and enter a *nolle prosequi* upon the issues at any time up to final judgment (*p*). But he cannot do this if there is any issue still undisposed of which, if found against him, would destroy the whole cause of action (*q*).

Where there is a finding for defendant on one plea.

Where there are several issues upon the record, and a finding for the defendant upon one which goes to the merits of the whole action, it is unnecessary for the jury to assess damages upon the others (*r*).

Where there are several counts on the same cause of action.

4. When there are several counts on the same cause of action, and only one cause of action is proved, the plaintiff is entitled to a verdict on one count only, and to have his costs taxed on that count only (*s*). And, accordingly, where a declaration for non-repair against a tenant contained two counts, one founded on an express agreement to repair, and

(*l*) *Burdett* v. *Colman*, 13 East, 27.
(*m*) *Lumley* v. *Gye*, 2 E. & B. 216; 22 L. J. Q. B. 463.
(*n*) *Thompson* v. *Percival*, 2 B. & Ad. 968.
(*o*) See *Gregory* v. *Duke of Brunswick*, 6 M. & G. 953.
(*p*) *Fleming* v. *Langton*, 1 Stra. 532; 1 Wms. Saund. 109; [1 Wms. Notes to Saund. 124.]
(*q*) *Dicker* v. *Adams*, 2 B. & P. 163. Even in such a case, however, he may enter a *nolle prosequi* as to the other issues—except as to the costs of the demurrer. These he will retain, but of course no damages; *Williams* v. *Vines*, 9 Jur. 809.
(*r*) *Gregory* v. *Duke of Brunswick*, 3 C. B. 481.
(*s*) *Ward* v. *Bell*, 1 C. & M. 848.

the other founded on an implied promise to use in a tenant-like manner, founded on his occupation, it was held that he could not recover on both counts unless he could prove a second contract in fact, relating to another and different messuage (*t*). And a new trial was ordered. And so where general damages were given upon two counts framed upon the same warranty, Patteson, J., said, "The new rules allow of only one count upon one subject-matter of complaint; by which, in cases of contract, I understand, not merely the breach of contract, but the contract itself, as the foundation and part of the matter of complaint, and, if necessary, there may be an amendment" (*u*). But where the making of a contract entails one liability, and its performance another, two counts may be joined on the express and implied agreement, and damages allowed on both; as, for instance, for dismissal without a month's warning, and for wages for the period actually served; because the implied contract for wages *pro ratâ* arose, not from the original agreement between the parties, but from the performance of it (*x*). In one case, two counts were allowed for breach of contract in using a vessel for an illegal purpose, whereby she was seized, and for detaining her beyond the time for which she was hired. Tindal, C. J., said, "The first count is for a malfeasance; the second is founded upon the express contract between the parties. If we were not to allow the plaintiff to set up the collateral contract implied by law contained in the first count, we might probably deprive him of his principal ground of complaint" (*y*). In a later case, however, Patteson, J., said that this case was rather at variance with *Holford* v. *Dunnett*, and that he should have thought that one of the counts ought to have been struck out (*z*).

Plaintiff compelled to elect.

Where there are different counts, upon one of which alone damages can be obtained, and there is a general verdict for the plaintiff, the Court will compel him in the term after trial to elect on which he will enter up verdict (*a*). And where

(*t*) *Holford* v. *Dunnett*, 7 M. & W. 348.
(*u*) *Deere* v. *Ivey*, 4 Q. B. 379, 384.
(*x*) *Hartley* v. *Harman*, 11 A. & E. 798; 7 M. & W. 352.
(*y*) *Bleaden* v. *Rapallo*, 3 M. & G. 116.
(*z*) 4 Q. B. 385, *sed. qu.?*
(*a*) *Lee* v. *Muggeridge*, 5 Taunt. 36; *Taylor* v. *Neufield*, 4 E. & B. 462.

there are two counts, and defendant lets judgment go by default upon one, on which the plaintiff may recover all he is entitled to, if plaintiff chooses to go to trial, damages will be assessed on the count on which judgment went by default, and he will have to bear all the costs of trial that have been unnecessarily incurred (*b*).

Assessing damages upon several counts.

5. Where there are several causes of action in the same declaration against the same defendant, and there is a general verdict for the plaintiff, damages may be assessed severally upon each count (*c*). And this is the safer course; for when damages are entirely assessed, it shall be intended for all that for which the plaintiff complains (*d*). And therefore, if any one of the alleged causes of action are insufficient, a *venire de novo* will be awarded (*e*). And for this purpose, several breaches of the same agreement (*f*), or of the same covenant (*g*), are considered as several counts. And the same appears to be the case, where a distinct issue is taken upon one part of a count, which might have been rejected as surplusage, and which is found for the plaintiff (*h*).

Or upon the same count which contains several demands.

On the other hand, if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts (*i*). It may be asked, however, whether the result would be the same, if it appeared that the jury had, in fact, given damages on a bad cause of action? An action of trespass was brought against a surveyor for cutting the plaintiff's trees, which overhung the highway. Defendant pleaded an order by the justices under the Highway Act, authorising him to do so. The order was bad as to part of the trees, and

(*b*) *Compere* v. *Hicks*, 7 T. R. 727.
(*c*) 1 Roll. Abr. 570. [See *Clarke* v. *Roe*, 4 Ir. C. L. 1.]
(*d*) 10 Rep. 130, a.
(*e*) *Chadwick* v. *Trower*, 6 Bingh. N. C. 1; *Leach* v. *Thomas*, 2 M. & W. 427; [*Stevenson* v. *Newnham*, 13 C. B. 285.] Formerly the rule used to be to arrest judgment *in toto*; *Gramvel* v. *Rhobotham*, Cro. Eliz. 865; *Staynrode* v. *Locock*, Cro. Jac. 115; 5 Rep. 108 b.; *Holt* v. *Scholefield*, 6 T. R. 691; *Sicklemore* v. *Thistleton*, 6 M. & S. 9; but the practice is now settled as stated above.
(*f*) *Leach* v. *Thomas*, *ubi sup.*
(*g*) *Sicklemore* v. *Thistleton*, *ubi sup.*
(*h*) *Chadwick* v. *Trower*, *ubi sup.*
(*i*) *Lawrie* v. *Dyeball*, 8 B. & C. 70; *Campbell* v. *Lewis*, 3 B. & A. 392; 3 Exch. 52.

therefore formed no justification. As to part it was good. The jury found a general verdict for the plaintiff as to the injury to all the trees, under the direction of the judge, who told them that the order was entirely bad. A new trial was directed, that the jury might enquire whether the defendant cut down more trees than the good part of the order would justify, and to assess damages accordingly (*k*). Though not directly in point, the principle of this case seems to bear strongly upon the question suggested. And so where a single count in trover charged the conversion of goods, chattels, and *fixtures*, to wit, &c., and a general judgment for the plaintiff, a motion was made to set aside the verdict on the ground that trover did not lie for fixtures. Parke, B., said, that if it were clear that this declaration contained two distinct causes of action, for one of which trover could not be maintained, then, as general damages had been assessed upon the whole declaration, there must be either an arrest of judgment, or *venire de novo;* it was unnecessary to determine which. And he said the case was distinguishable from that of an action for words, some of which are not actionable; for there the Court would presume that the non-actionable words were not intended to constitute the cause of action, but were used merely as matter of aggravation or explanation. The Court held, however, that fixtures did not necessarily mean things affixed to the freehold, and therefore the objection fell to the ground in that instance (*l*). The language of the learned Baron seems as strong as possible upon the point.

In actions for slander.

Where the action is for defamation, the following distinction is taken:—that if an action is brought for speaking words all at one time, that is, all in one count, and there is a verdict, though some of the words will not maintain the action, yet if any of the words will, the damages may be given entirely; for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation. But if the action be brought for several words spoken at several times, and the action will not lie for the words spoken at one time, but will lie for the words

(*k*) *Jenney* v. *Brook*, 6 Q. B. 323.
(*l*) *Sheen* v. *Rickie*, 5 M. & W. 175, 181.

spoken at another, and a verdict be found for all the words, and entire damages given, it is not good (*m*). In an early case the first branch of this rule was put on the common-sense ground, that if judgment must be arrested, a man by speaking words not actionable and words actionable together would secure himself from action, because he must be found guilty of the whole or none (*n*). The latter part of the rule, so far as it conflicts with that laid down in *Lawrie* v. *Dyeball*, cited above, probably proceeds on the ground, that when words appear to have been spoken on different occasions, the Court would treat them as different counts. If, then, one turned out to be bad, of course general damages assessed on all would be bad also. Accordingly, in one case, where statements of different libels were each prefaced with "afterwards to wit, on" &c., each statement was held to be a different count. Lord Abinger, C. B., said, "You may put into one count for libel or slander all words spoken or written at one time; but I am not aware that you may put into one count matters published at different times. Here each particular count presents a different story" (*o*). The difficulty would arise, where words really spoken at different times, but appearing to be spoken at the same time, were united in one count.

Where, however, the words laid were such as the jury never could have considered libellous, or taken into consideration in assessing damages, even their being spoken at different times might possibly make no difference. (*p*).

In detinue, damages ought to be assessed as to each chattel separately, that a satisfaction may be had in value for each parcel in case they be not all delivered (*q*). And if the jury do not assess damages, the Court cannot exercise its jurisdiction under 17 and 18 Vict. c. 125, s. 78, to order a delivery to the plaintiff in specie (*r*); nor can the defect be

(*m*) 2 Wms. Saund. 171, d.; [2 Wms. Notes to Saund. 498;] *Bois* v. *Bois*, 1 Lev. 134; *Brooke* v. *Clarke*, Cro. Eliz. 328; *Penson* v. *Gooday*, Cro. Car. 327; *Griffiths* v. *Lewis*, 8 Q. B. 841; *Alfred* v. *Farlow*, 8 Q. B. 854.

(*n*) *Lloyd* v. *Morris*, Willes, 443.

(*o*) *Hughes* v. *Rees*, 4 M. & W. 204, 206.

(*p*) 1 Roll. Abr. 577; *Bridges* v. *Horner*, Carth. 230; *Nicholls* v. *Recve*, 1 Freem. 83.

(*q*) *Pawly* v. *Holly*, 2 W. Bl. 853.

(*r*) *Chilton* v. *Carrington*, 15 C. B. 730; 24 L. J. C. P. 78.

remedied by a writ of inquiry, but there must be a *venire de novo* (*s*).

Prospective damages.

I examined in the early part of this work (*t*) the cases in which damages might be given in respect of matter subsequent to action brought. It is only necessary to say here, that where it is positively and expressly alleged in the declaration, that the plaintiff has sustained damages from the cause subsequent to the commencement of the action, or previous to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible, or impossible, and therefore it cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to his judgment (*u*).

Misjoinder of counts.

6. Where there is a misjoinder of several counts, which are in themselves good, and general damages are given, judgment will be arrested. And it is the same where one count consists of several causes of action, which ought not to have been united. In such a case a *venire de novo* cannot be awarded, because it is only admissible where the jury must find differently, in order to make the record consistent. But in this case, the jury were bound to assess damages on every part of the declaration (*x*). But if there be a misjoinder of counts, and verdict for the plaintiff on the counts properly joined, and for the defendant on the others, this would be no ground for arresting the judgment (*y*). And so the defect would be cured, if the jury were directed to find for the defendant on the count wrongly joined, or if a *nolle prosequi* were entered upon that count. (*z*).

Where the action is against several, damages must be assessed generally.

II. 1. Where an action is brought against several, and the plaintiff has a verdict against all, if the action is on a contract, it must of course be for the amount of the single liability which rests upon all. And even where the action is for a tort, the jury must assess damages generally against all, and that

(*s*) 10 Rep. 119, b.; *Herbert* v. *Waters*, 1 Salk. 205.
(*t*) *Ante*, p. 58.
(*u*) 2 W. Saund. 171; [2 Wms. Notes to Saund. 495.]
(*x*) *Corner* v. *Shew*, 3 M. & W. 350; *Kitchenman* v. *Skeel*, 3 Exch. 49.
(*y*) *Kightly* v. *Birch*, 2 M. & S. 533.
(*z*) *Kitchenman* v. *Skeel*, *ubi sup.*

whether they unite or sever in the pleas and issues (*a*). And in such a case, the measure of damage is the gross amount of injury which the plaintiff has received from all, "although one of them *de facto* does more and greater wrong than the others, yet all coming to do an unlawful act and of one party, the act of one is the act of all of the same party being present" (*b*). A doubt has, however, been expressed lately as to this latter doctrine. An action was brought against the sheriff and one of his officers jointly, and large damages given. The Court held that the damages were not excessive against the sheriff, but that they would be against his officer only for the doctrine above mentioned. "It has been said," they observed, "that in an action of tort against several defendants who have taken different parts in the transaction, the measure of damages ought to be the sum which ought to be awarded against the most guilty of the defendants. We wish to afford an opportunity for discussing whether there be such a doctrine, and how far it applies to the present cause" (*c*). And it is quite settled that in no case can the malignant motive of one party be made a ground of damage against the other party, who was altogether free from such improper motive. In such case the plaintiff ought to select the party against whom he means to get aggravated damages (*d*).

Contrary decisions.

It is laid down in some old authorities, that in trespass against two, if the jury find one guilty at one time, and the other at another, there several damages may be taxed; but if the plaintiff himself confesses, that they committed the trespasses severally, there the writ shall abate; and so there is a difference between finding by verdict, and confession of the party (*e*). And so where one is found guilty of one part and one of another (*f*); or one of part and another of the

(*a*) *Cocke* v. *Jennor*, Hob. 66; *Heydon's case*, 11 Rep. 5, b; *Crane* v. *Hummerstone*, Cro. Jac. 118; *Onslow* v. *Orchard*, Stra. 422; *Lowfield* v. *Bancroft*, Stra. 910; *Hill* v. *Goodchild*, 5 Burr. 2790.

(*b*) 11 Rep. 5, b; *Brown* v. *Allen*, 4 Esp. 158; *Eliot* v. *Allen*, 1 C. B. 18; *Clark* v. *Newsam*, 1 Exch. 131.

(*c*) *Gregory* v. *Cotterell*, 22 L. J. Q. B. 217.

(*d*) *Clark* v. *Newsam*, 1 Exch. 131, 140. See *Wright* v. *Court*, 2 C. & P. 232.

(*e*) 11 Rep. 5, b.

(*f*) *Player* v. *Warn*, Cro. Car. 54.

whole (*g*). And where entire damages were found in such a case against all, judgment was reversed (*h*). It seems, however, that this is not considered to be law now. Torts being in their nature several, the jury may find any one guilty, and acquit the rest; but if they find several guilty, they can only convict them of that which is charged against them, viz., a joint offence. Accordingly where several persons were sued jointly for assault and false imprisonment, two having taken the plaintiff into custody, and delivered him over to the third by whom he was detained, it was ruled that the attention of the jury must either be confined to what took place at the place of detention, or there must be a verdict in favour of the third defendant. And for this reason, because the damages being joint against all, the latter defendant would be liable to pay for an act, with the commission of which he had nothing to do (*i*). And so when the action was against three, for entering a dwelling-house and seizing goods, and the evidence proved that two of the defendants seized the goods, and one entered the house, but no joint trespass was established. Cresswell, J., compelled the plaintiff's counsel to elect on which trespass he would go to the jury. As soon as the plaintiff has proved a distinct trespass committed by one of several defendants, and by him alone, and then tenders evidence of a different trespass, he is liable to be called on to make his election (*k*).

Where some pay money into court.

2. Where some plead to the whole action, and others pay money into Court, if the jury find all guilty, and that the sum paid is enough as to all, they must acquit the party pleading payment, and find against the other parties with nominal damages. But they cannot find that the sum is enough as to the party paying it, and further damages against the others. In such a case, if the tort was actually a joint one, they must find against all for the surplus left unsatisfied after the payment into Court (*l*).

(*g*) *Austen* v. *Willward*, Cro. Eliz. 860; *Whitwell* v. *Short*, Styl. 5.
(*h*) *Ibid.*
(*i*) *Aaron* v. *Alexander*, 3 Camp. 35; *Powell* v. *Hodgetts*, 2 C. & P. 432.
(*k*) *Howard* v. *Newton*, 2 M. & Rob. 509; and see *Barnard* v. *Gostling*, 1 N. R. 245.
(*l*) *Per* Patteson, J., *Walker* v. *Woolcott*, 8 C. & P. 352.

How assessment of damages severally may be remedied.

Where damages are assessed severally instead of jointly, judgment will be reversed (*m*); but the plaintiff may cure it by taking judgment *de melioribus damnis* against one, and entering up a *nolle prosequi* against the others, and this whether they have joined or severed in pleading (*n*). And this does not operate as a release, which would enure to the discharge of all (*o*). Or he may have judgment for the greater damages against all, either with or without entering a *remittitur* as to the lesser, for taking the greater damages operates as a *remittitur* of the less (*p*).

Judgment by default against all.

3. Where judgment by default has gone against all, the plaintiff should have damages assessed by a single writ of inquiry, if necessary. Where a plaintiff executed several writs of inquiry in such a case, and several damages were given against each, it was held that if he had entered up final judgment upon these interlocutory judgments it would have been erroneous. But upon payment of costs the plaintiff was allowed to set aside his own proceedings (*q*).

Judgment by default against one in contract.

The effect of a judgment by default, suffered by one only of several defendants, differs according as the action is in contract or for a tort. In the former case, if the writ has been specially endorsed, the plaintiff may issue execution against the defendant who has not appeared, in which case he shall be taken to have abandoned his action against the other defendants. Or he may declare against those who have appeared, suggesting the judgment by default, which shall then have the same operation as before the act (*r*). The latter course would be a very dangerous one, unless success against the defendants who have appeared is certain, since if he should fail against them in consequence of a defence which goes to the ground of the action, he could not have judgment against the party who had made default (*s*); and he could not remedy it by entering a *nolle prosequi* against those who appeared (*t*). Where, however, the plea of those who appear

(*m*) *Onslow* v. *Orchard*, Stra. 422; *Hill* v. *Goodchild*, 5 Burr. 2790.
(*n*) *Walsh* v. *Bishop*, Cro. Car. 243; *Rodney* v. *Strode*, Carth. 19.
(*o*) Cro. Car. 243; *Cocke* v. *Jennor*, Hob. 66.
(*p*) *Johns* v. *Dodsworth*, Cro. Car. 192; *Sabin* v. *Long*, 1 Wils. 30.
(*q*) *Mitchell* v. *Milbank*, 6 T. R. 199.
(*r*) C. L. P. Act, 1852, s. 33.
(*s*) *Porter* v. *Harris*, 1 Lev. 63; *Boulter* v. *Ford*, 1 Sid. 76.
(*t*) 1 W. Saund. 207, a; [1 Wms. Notes to Saund. 215.]

is a matter of mere personal discharge, as bankruptcy, insolvency, *ne unques executor* (*u*); or even where such a plea is joined with one which goes to the base of the action (*x*), teh plaintiff may enter a *nolle prosequi* against the party pleading, and still retain his remedy against the other. But infancy is not such a plea of merely personal discharge as will allow of a *nolle prosequi* being entered, since it proves that there never was a binding contract made by all the parties, not that it has ceased to bind one of them (*y*). The proper course in such a case is to discontinue and sue the adult alone (*z*).

In tort.

Where the action against several is in tort, and some let judgment go by default, and others plead, a special venire is awarded, *tam ad triandum quam ad inquirendum*, and the jury who try the issue shall assess damages against both (*a*). And if upon the trial those who have pleaded should be acquitted, damages may still be assessed against those who have let judgment go by default (*b*). But it would be otherwise if the plea of those who appear, not only operates as a defence to themselves, but shows that the plaintiff had no cause of action against either, as that the goods taken were a gift from the plaintiff to the defendant, or a lawful distress for rent, or that the plaintiff had released one of the joint-trespassers (*c*). It seems, however, that the plaintiff may, at his option, take judgment against those who make default and enter a *nolle prosequi* against the others (*d*).

Plaintiff cannot be nonsuited against those who appear.

When there are several defendants, and judgment has gone by default as to one or more, and the others plead, the plaintiff cannot be nonsuited as to those who appear, whether the action be on a contract (*e*) or for a tort (*f*). Lord Mansfield said,

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(*u*) *Noke* v. *Ingham*, 1 Wils. 89.

(*x*) *Moravia* v. *Hunter*, 2 M. & S. 444.

(*y*) *Chandler* v. *Parkes*, 3 Esp. 76; *Jaffray* v. *Frebain*, 5 Esp. 47.

(*z*) *Burgess* v. *Merrill*, 4 Taunt. 468.

(*a*) 11 Rep. 6, a. [And this is also the proper course when the action is in contract for unliquidated damages; *Thompson* v. *Shanley*, 4 Ir. C. L. R. 617; 2 Ch. Arch. Pr. 980, 9th ed.]

(*b*) *Jones* v. *Harris*, Stra. 1108; *Cressy* v. *Webb*, Stra. 1222.

(*c*) *Briggs* v. *Greinfeild*, Stra. 610; 2 Lord Raym. 1372, S. C.; *Marler* v. *Ayliffe*, Cro. Jac. 134; 1 Inst. 125, b.

(*d*) *Walsh* v. *Bishop*, Cro. Car. 239, 243.

(*e*) *Weller* v. *Goyton*, 1 Burr. 358; *Hannay* v. *Smith*, 3 T. R. 662. [But the contrary was held subsequently in *Murphy* v. *Donlan*, 5 B. & C. 178.]

(*f*) *Harris* v. *Butterley*, 2 Cowp. 483.

"Here was a judgment obtained by the plaintiff against one of the defendants already. How then can the plaintiff be out of court as to him? But if he is nonsuited in this action he will be out of court as against both defendants" (*g*). And so it is laid down that where defendants sever in pleading, and the plaintiff is nonsuited against one, this is a complete discharge to the others (*h*).

Where several plead severally.

4. Where, in actions of tort against several, they plead severally, and several *venire facias* are awarded, the inquest which first passed shall assess damages for all, and the second inquest shall not assess damages, but he shall be contributory to the damages assessed by the first, notwithstanding he is not party to it (*i*). The word "contributory," as used by Lord Coke in this passage, of course means only "subject" to the judgment, for there can be no contribution for damages among wrong-doers (*k*).

Where one demurs.

5. Where there has been a demurrer by one defendant, and an issue in fact by the other, the jury who try the issue in fact must also assess damages contingently upon the demurrer. And if they return an absolute verdict against both defendants, it will be set aside with costs for irregularity, and a new trial granted (*l*).

Where all appear.

6. When all the defendants appear at the same time, to try the same issues, if the plaintiff has a verdict against all, no difficulty arises. Where in an action on a contract he fails to prove his case against one, he will be nonsuited (*m*). But if this failure arises merely from misjoinder, he will be allowed to amend, either before or at the time of trial, by leave of the Court or a judge, provided no injustice will be done thereby (*n*). Where, however, the action is for a tort, a failure against one is no ground for nonsuit against the others (*o*), unless the gist of the action is a contract. If so,

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(*g*) 1 Burr. 359.
(*h*) *Parker* v. *Lawrence*, Hob. 70; *Slowley* v. *Eveley*, Hob. 180; *Snow* v. *Como*, 1 Stra. 507, Bull. N. P. 20.
(*i*) 11 Rep. 6, a.
(*k*) *Merryweather* v. *Nixan*, 8 T. R. 186.
(*l*) *Thompson* v. *Percival*, 2 B. & Ad. 968.
(*m*) *Weall* v. *King*, 12 East, 452.
(*n*) C. L. P. Act, 1852, s. 37.
(*o*) *Bretherton* v. *Wood*, 3 B. & B. 54; *Pozzi* v. *Shipton*, 8 A. & E. 963.

the form of it in tort makes no difference as to the right of the parties to have a judgment against all (*p*).

Former recovery in tort.

But although in tort the plaintiff may proceed against any of the wrong-doers separately, a recovery against one will be a bar to an action against any other whom he might have joined in the same action; for by the judgment the damages are converted into certainty (*q*). But the mere pendency of an action against one is no answer to an action against another (*r*), whether in contract or on a tort.

Verdict for larger damages than are claimed.

III. We have seen before (*s*) that no greater damages can be given than are alleged in the declaration. If the jury give more it will be error, and the judgment will be reversed (*t*). The plaintiff may, however, cure this defect himself before judgment, by entering a *remittitur* of the excess (*u*). After judgment the party cannot himself make the amendment, but the Court will, in the exercise of their authority to amend, allow him to become their instrument for that purpose; and this they will do, even in a subsequent term, and after error brought on this very account, and joinder therein (*x*).

Where, by mistake, the damages have been laid at too small a sum, and the jury have found a larger amount, the Court will not amend the defect by increasing the damages laid in the declaration to the right amount after verdict, though the mistake is palpable on the face of the record; but they will allow a new trial on payment of costs by plaintiff, and with leave to amend the declaration (*y*).

Double and treble damages.

IV. There are various statutes which give double and treble damages against a person violating their provisions. For instance, treble damages are given for a forcible entry into the

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(*p*) *Weall* v. *King*, *ubi sup.*; *Powell* v. *Layton*, 2 N. R. 369.

(*q*) *Morton's case*, Cro. Eliz. 30; *Brown* v. *Wootton*, Cro. Jac. 74; *Cocke* v. *Jennor*, Hob. 66; *Lechmere* v. *Fletcher*, 1 C. & M. 634; *King* v. *Hoare*, 13 M. & W. 504; *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584; 40 L. J. C. P. 281; affd. 41 L. J. C. P. 190.

(*r*) *Henry* v. *Goldney*, 15 M. & W. 494; overruling *Boyce* v. *Douglass*, 1 Camp. 60.

(*s*) *Ante*, p. 97.

(*t*) 1 Roll. Abr. 578; *Persival* v. *Spencer*, Yelv. 45; *Hoblins* v. *Kimble*, 1 Bulstr. 49; *Cheveley* v. *Morris*, 2 W. Bl. 1300.

(*u*) *Coy* v. *Hymas*, 2 Stra. 1171; *Mills* v. *Funnell*, 2 B. & C. 899.

(*x*) *Pickwood* v. *Wright*, 1 H. Bl. 643; *Usher* v. *Dansey*, 4 M. & S. 94. For the principle of these amendments, see *post*, ch. 19.

(*y*) *Tomlinson* v. *Blacksmith*, 7 T. R. 132; *Tebbs* v. *Barron*, 4 M. & Gr. 844.

lands of the plaintiff (*z*), or for extortions by sheriffs, coroners, and officers of that nature (*a*), or for an improper impounding of a distress (*b*), or where a verdict is found for the defendant in replevin, where a distress has been taken for poor-rates (*c*). And so double damages are given for distraining the plaintiff's goods, no rent being due (*d*). And treble damages for [pound breach or] rescuing a distress (*e*). In all these cases the practice is to take the sum returned by the jury, and without any further communication with them, to double or treble the amount (*f*).

V. Having now gone through the practice according to which a jury ought to assess damages, it remains to notice the manner in which any omission by them so to do may be supplied.

When a writ of inquiry may assess damages in place of the principal jury.

The law upon this point was laid down in an old case as follows: "Where the matter omitted to be inquired by the principal jury is such as goes to the very point of the issue, and upon which, if found by the jury, an attaint will lie against them by the party, if they have given a false verdict, there such matter cannot be supplied by a writ of inquiry, because thereby the plaintiff may lose his action of attaint (*g*), which will not lie upon an inquest of office. But where the matters omitted to be inquired by the jury do not go to the point in issue, or necessary consequence thereof, but are things merely collateral, as damages in replevin for poor-rates, and the four usual inquiries on a *quare impedit*, such may be inquired of by a subsequent writ of inquiry, because if the same had been inquired into by the principal jury, it would have been, as to those particulars, no more than an inquest of office, upon which an attaint does not lie" (*h*).

(*z*) 8 Hen. VI. c. 9, s. 6; Dyer, 214, a, pl. 45.

(*a*) 13 Hen. VI. c. 10, s. 11; 29 Eliz. c. 4; *Brunsden's* (*Bumpsted's*) *case*, Cro. Car. 438, 448.

(*b*) 1 & 2 Ph. & M. c. 12, s. 1.

(*c*) 43 Eliz. c. 2, s. 19; *Newman* v. *Barnard*, 10 Bingh. 274; *ante*, p. 320.

(*d*) 2 W. & M. sess. I. c. 5, s. 5; *Masters* v. *Farris*, 1 C. B. 715.

(*e*) 2 W. & M. sess. I. c. 5, s. 4; *Anon.* Lord Raym. 342; *Lawson* v. *Storie*, Salk. 205.

(*f*) *Attorney-General* v. *Hatton*, 13 Pri. 476, M'Clell. 214; *Buckle* v. *Bewes*, 4 B. & C. 154, Bro. Dam. pl. 70.

(*g*) Now abolished by 6 Geo. IV. c. 50, s. 60.

(*h*) *Herbert* v. *Waters*, Carth. 362.

Hence no writ of inquiry can issue where the jury have omitted to assess damages in detinue or trespass (*i*); or libel (*k*); or on a bond conditioned for the performance of covenants within statute 8 & 9 W. III. c. 11 (*l*); or in assumpsit, though the only issue be on a plea of abatement (*m*). But in all these a *venire de novo* must be awarded. Nor can an omission to assess damages on the traverse to a return to a mandamus be supplied (*n*). Where, however, in such a case as that last mentioned, the jury had omitted to give nominal damages, but the omission to mention them to the jury, and to enter them as part of the associate's minutes, was accidental, the judge having intended so to direct them, it was held that the judge was justified in ordering 1*s*. damages to be entered on the postea (*o*).

Where damages are not the only thing to be recovered, as in actions of debt, or for an annuity, an omission or defect in their assessment may be remedied by a release (*p*), which may be entered at any time before judgment (*q*). But if the jury do not assess damages, where damages alone are recoverable, the defect cannot be aided by a release (*r*).

Confession.

On the other hand, where the plaintiff has had a verdict, and damages assessed upon an immaterial issue, upon which judgment would be arrested, or even where judgment has gone for the defendant, still, if enough appears upon the pleadings to entitle the plaintiff to judgment by confession, a writ of inquiry may issue to assess new damages (*s*). And the plaintiff, even without leave of the Court, may execute a writ of inquiry to assess damages, where the circumstances of the case have entitled him to enter up judgment *non obstante veredicto* (*t*). So on a demurrer to the evidence, the jury may inquire conditionally of the damages, or a writ of inquiry

Demurrer to evidence.

(*i*) 10 Rep. 119.
(*k*) *Clement* v. *Lewis*, 3 B. & B. 297.
(*l*) *Hardy* v. *Bern*, 5 T. R. 540, 636.
(*m*) *Eichorn* v. *Le Maistre*, 2 Wils. 367.
(*n*) *Kynaston* v. *Mayor of Shrewsbury*, 2 Stra. 1051.
(*o*) *Reg.* v. *Fall*, 1 Q. B. 636.
(*p*) 11 Rep. 56, a.
(*q*) 2 Roll. 75.
(*r*) Com. Dig. Dam. E. 8.
(*s*) *Lacy* v. *Reynolds*, Cro. Eliz. 214; *Jones* v. *Bodinner*, Carth. 370; *Broome* v. *Rice*, 2 Stra. 873.
(*t*) *Shephard* v. *Halls*, 2 Dowl. 453.

may issue (*u*); or in an action of dower *unde nihil habet* (*x*). In replevin, where the plaintiff is nonsuited or has verdict against him, the defendant cannot have judgment under 17 Car. II. c. 7, for the arrear of rent, or the value of the distress, unless the jury empannelled to try the issue shall have inquired into the amount (*y*). But in every other case of replevin, the omission of the jury to find damages for the defendant, whether under statutes 7 H. VIII. c. 4, and 21 H. VIII. c. 10, or under 43 Eliz. c. 2, sect. 19, may be remedied by a writ of inquiry (*z*). Of course where an act, authorising a distress for local purposes, gives the avowant no damages in case of success, no inquiry is required, or can take place (*a*).

Replevin.

Where the plaintiff has a verdict in detinue, the jury should assess the value of each article separately (*b*), and if they do not, a writ of inquiry cannot supply the defect (*c*). But it would appear that the rule may be otherwise where there is a judgment by default. The latter point arose in a recent case. In an action of detinue, judgment had gone by default. The plaintiff sued out a writ of inquiry, and the jury taxed damages for the detention, but not the value of the goods. Final judgment was issued for a restitution of the goods, or their value (not stating any), and for damages and costs. On error it was held, first, that the judgment, though imperfect, was still final, and consequently a *remittitur* could not be entered. Secondly, that though probably the Court below might have awarded a fresh writ of inquiry, the Court of Error could not do so, as they had no authority to amend the judgment against the plaintiff in error in favour of the defendant in error (*d*). Thirdly, that the Court of Error could

Detinue.

(*u*) *Darrose* v. *Newbott*, Cro. Car. 43; *Sir James Harbert's case*, Skinn. 595.

(*x*) Say. Dam. 126.

(*y*) See *ante*, p. 320.

(*z*) Gilb. Distress, 193; *Harcourt* v. *Weeks*, 5 Mod. 77; *Herbert* v. *Waters*, Carth. 362; *Dewell* v. *Marshall*, 3 Wils. 442; *Valentine* v. *Fawcett*, 2 Stra. 1021; and see *Wright* v. *Lewis*, 9 Dowl. 183.

(*a*) *Gotobed* v. *Wool*, 6 M. & S. 128.

(*b*) *Pawly* v. *Holly*, 2 W. Bl. 853.

(*c*) 10 Rep. 119, b; *Herbert* v. *Waters*, 1 Salk. 205.

(*d*) But now Courts of Error have in all cases power to give such judgment, and award such process, as the Court from which error is brought ought to

not divide the judgment, so as to allow the plaintiff below to take out execution for his damages and costs alone. Consequently judgment was reversed (*e*).

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have done, without regard to the party alleging error, Common Law Procedure Act, 1852, s. 157.

(*e*) *Phillips* v. *Jones*, 15 Q. B. 869.

CHAPTER XIX.

POWERS OF THE COURT OR JUDGE IN REGARD TO DAMAGES.

1. *Right to Begin.*
2. *Directing the Jury.*
3. *Amending the Postea.*
4. *Increasing or Abridging Damages.*
5. *New Trial.*

THE last subject we have to consider is the part which may be taken by the Court or a judge in respect to damages; their duties and their powers. It will be found that very important functions of this sort may be exercised, both during and after trial.

Right to begin.

1. A matter of very considerable importance to the plaintiff in many cases, is the right to begin. Many of the principles upon this point are quite unconnected with the topics discussed in this treatise. There is one, however, directly relevant, viz., the rule, that no matter on whom the proof of the issue may be thrown by the pleadings, the plaintiff must begin whenever he proceeds for unascertained damages (*a*). When, however, the affirmative issue rests in other respects upon the defendant, if the plaintiff's counsel will not undertake to offer proof of substantial damages, the right to commence then passes to the defendant (*b*). But, even where the judge has ruled wrongly upon this point, a new trial will not be granted, unless manifest injury has been done to the party against whom he decided (*c*).

Directing the jury.

2. Another imperative duty resting upon the judge at Nisi Prius is to direct the jury as to any rule of law by which they

(*a*) *Mercer* v. *Whall*, 5 Q. B. 447; *Edge* v. *Hillary*, 3 C. & K. 43.
(*b*) *Chapman* v. *Rawson*, 8 Q. B. 673.
(*c*) *Edwards* v. *Matthews*, 4 D. & L. 721; *Brandford* v. *Freeman*, 5 Exch. 734.

ought to be governed in their assessment of damages. Any omission, mistake, or indefiniteness in this respect, in consequence of which the jury have gone astray, will be set right by a new trial (*d*), and this whether the point has been taken at the time of trial by counsel or not (*e*).

Powers of amendment.

3. It sometimes becomes most important to procure an amendment of the postea; as, for instance, where the officer of the Court had entered nominal damages by mistake, where substantial had been given (*f*), or where the declaration laid the damages at 100*l.*, and in the Nisi Prius record they were stated to be 100*s.* (*g*), or where the jury have not assessed the value of the articles separately in detinue (*h*), or where general damages have been assessed upon a declaration in which some counts are bad (*i*). The rule upon this latter point has been laid down as follows. "If there is only evidence at the trial upon such of the counts as were good and consistent, a general verdict might be altered from the notes of the judge, and entered only on those counts. But if there is any evidence which applies to the other bad or inconsistent counts (as, for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict); there the postea cannot be amended, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them. In such a case the only remedy is by awarding a *venire de novo*" (*k*).

Application must be made to the judge who tried the cause.

Formerly it seems that the practice was to apply to the Court in which the record was, to make the required amend-

(*d*) *Blake* v. *Midland Ry. Co.*, 18 Q. B. 93; *Hadley* v. *Baxendale*, 9 Exch. 341.

(*e*) *Knight* v. *Egerton*, 7 Exch. 407.

(*f*) *Newcombe* v. *Green*, 2 Strs. 1197.

(*g*) 8 Rep. 157, a.

(*h*) *Sandford* v. *Alcock*, 10 M. & W. 689.

(*i*) *Eddowes* v. *Hopkins*, 1 Dougl. 377.

(*k*) *Per* Buller, J., *ubi sup.* In *Williams* v. *Breedon*, 1 B. & P. 329, it was held, that where damages were assessed generally on several counts, one of which was bad, the postea might be amended from the judge's notes, even though evidence applicable to the bad counts had been given, if it appeared, in fact, that the jury had calculated damages on evidence only applicable to the good counts. But this decision must be considered as overruled, *Spencer* v. *Goter*, 1 H. Bl. 78; *Empson* v. *Griffin*, 11 A. & E. 186; *Reg.* v. *Virrier*, 12 A. & E. 331.

ment (*l*). The modern practice, however, has long established that the proper course is to apply to the judge who tried the cause, in order that he may amend such entry by making it conformable with what took place at the trial (*m*). And his determination cannot be reviewed, because the Court has no power to compel a production of his notes (*n*). And for the same reason, the Court cannot amend a postea by the notes of an arbitrator (*o*). The only remedy in a case where such an amendment has been wrongly made, is to induce the judge who tried the cause to rescind his own order (*p*).

His decision is final.

Perhaps, however, this rule may extend no further than the reason given for it. In one case, where by consent at trial the plaintiff had entered his verdict on two counts, and then applied to the judge to confine it to one, he refused, but referred the case to the Court, to which he transmitted his notes. The Court made the proposed amendment. Tindal, C. J., said, "If, indeed, damages could have been given on the second count which could not have been given on the first, we should not do what is requested without the concurrence of the judge who tried the cause; but looking at the two counts we perceive that the cause of action in both is the same; the charters set out are the same; and the damages given must have been on the same account. The two counts are merely different modes of stating the same cause of action" (*q*). Here it is plain that their decision did not rest upon the judge's notes, and could not have been impeded had those notes been withheld.

The application may, however, be made to the judge in Court, that he may have the assistance of the other judges (*r*);

(*l*) *Eliot* v. *Skypp*, Cro. Car. 338; *Hankey* v. *Smith*, Barnes, 449; *Mayo* v. *Archer*, 1 Stra. 513; *Newcombe* v. *Green*, 2 Stra. 1197; *Spencer* v. *Goter*, *ubi sup.*; *Eddowes* v. *Hopkins*, *ubi sup.*; *Petrie* v. *Hannay*, 3 T. R. 659; *Williams* v. *Breedon*, *ubi sup.*

(*m*) *Newton* v. *Harland*, 1 M. & Gr. 958; *Ernest* v. *Brown*, 4 Bingh. N. C. 162; *Scougull* v. *Campbell*, 1 Chitt. 283.

(*n*) *Sandford* v. *Alcock*, 10 M. & W. 689; *Graham* v. *Bowham*, 1 Chitt. 284, n.; *Blair* v. *Street*, 2 Ad. & Ell. 329; *Newton* v. *Harland*, *ubi sup.*; *Daintry* v. *Brocklehurst*, 3 Exch. 691. *Contra*, *Empson* v. *Griffin*, 11 A. & E. 186.

(*o*) *Scougull* v. *Campbell*, *ubi sup.*

(*p*) *Kilner* v. *Bailey*, 5 M. & W. 385.

(*q*) *Henley* v. *Mayor of Lyme Regis*, 6 Bingh. 100.

(*r*) *Harrison* v. *King*, 1 B. & A. 163.

and where the judge who tried the cause has left the bench, the amendment may be made by the Court from his notes (*s*).

From what materials amendment may be made.

The postea may not only be amended by the judge's notes, but by those of the associate, or clerk of assize (*t*), or by those of the under-sheriff who tried the cause; but in the latter case the application is made to the Court (*u*).

The amendment must, however, be made from some document written at the time. Formerly it was held that it could be made from the judge's recollection (*x*), but this is now overruled (*y*), and the judge's notes, taken at the time, are conclusive, and no affidavits can be received to explain or contradict them (*z*).

Amendment must be in furtherance of the intention of the jury.

But although amendments of this nature are allowed in order to carry out the intention of the jury, by making the verdict what they meant, and had virtually found (*a*), the verdict cannot be altered unless it clearly appears that the alteration would be agreeable to the intention of the jury (*b*). Therefore, where in an action on 2 & 3 Ed. VI. c. 13, which gives treble value for not setting out tithes, the jury found a verdict only for the single value, it was held that the postea could not be amended by entering the verdict for the treble value (*c*). But where the plaintiff was entitled to treble damages, and the jury found a sum as and for single damages specifically, the Court allowed the amount to be trebled (*d*); but there the Court only gave the finding of the jury its legal effect (*e*). This intention can only be ascertained by what has passed in open Court. If the jury deliver one verdict, affidavits from them cannot be received to show that they intended to deliver another (*f*).

(*s*) *Richardson* v. *Mellish*, 3 Bingh. 334.

(*t*) *R.* v. *Keat*, 1 Salk. 47; *Parsons* v. *Gill*, *ibid.* 51; *Pedley* v. *Frampton*, 2 Chitt. 155; *Sandford* v. *Porter*, *ibid.* 351.

(*u*) *Wallis* v. *Goddard*, 2 M. & Gr. 912.

(*x*) *Eliot* v. *Skypp*, Cro. Car. 338.

(*y*) *R.* v. *Virrier*, 12 Ad. & Ell. 337.

(*z*) *Everett* v. *Youells*, 4 B. & Ad. 681; *R.* v. *Grant*, 5 B. & Ad. 1081.

(*a*) *Wallis* v. *Goddard*, *ubi sup.*

(*b*) *Spencer* v. *Goter*, 1 H. Bl. 78; *Reece* v. *Lee*, 7 Moo. 269; *Ernest* v. *Brown*, 4 Bing. N. C. 167; Bull. N. P. 320.

(*c*) *Sandford* v. *Clarke*, 2 Chitt. 351.

(*d*) *Baldwyn & Girrie's Case*, Godb. 245.

(*e*) 2 M. & W. 199.

(*f*) *Jackson* v. *Williamson*, 2 T. R. 281; *Bentley* v. *Fleming*, 1 C. B. 479; *Raphael* v. *Bank of England*, 17 C. B. 161.

Where on judgment on demurrer for plaintiff, he enters up judgment for himself on two counts, and afterwards discovers an error in one, he may undo his own act, and enter judgment for the defendant on the bad count (*g*). But where, in a penal action, plaintiff entered the verdict for the penalty on a bad count, the Court held that he could not amend, by applying it to another count which was good, though it was proved by the evidence (*h*).

The last remarks which it is necessary to make upon the subject of amendments, relate to the time at which they may be made.

At what time the amendment may be made.

Formerly it was held that where damages were assessed generally upon defective counts, the postea could not be amended after judgment (*i*), at all events unless the amendment was made in the same term in which the judgment was entered up (*k*). This seems to have been on the idea that such amendments were made by the common law authority of the judges, which can only be exercised in the same term, while the record is in the breast of the judges, and not in the roll (*l*). It is now, however, settled that such amendments are made, not at common law, but by virtue of the statutes of misprision, 14 Ed. III. c. 6; 9 Hen. V. c. 4; 4 Hen. VI. c. 3; 8 Hen. VI. cc. 12 & 15, which enacted that the king's judges of the courts in which any record for the time shall be, shall have power to examine such record, and to amend all that which to them in their discretion seemeth to be misprision of the clerks in such record, so that by such misprision of the clerk no judgment shall be reversed or annulled. This was very clearly laid down in a modern case (*m*). There Patteson, J., said, "It is said that a judgment cannot be amended after the term in which it has been entered up, unless the error to be amended is a mere misprision, and that the error in this case is no misprision. In one sense it certainly is not misprision, for it agrees with the postea, and the only mistake

(*g*) *Spicer* v. *Teasdale*, 2 B. & P. 49.
(*h*) *Holloway* v. *Bennet*, 3 T. R. 448; *Hardy* v. *Cathcart*, 5 Taunt. 11.
(*i*) *Mornington* v. *Try*, Cro. Eliz. 111; *Sandiford* v. *Bean*, 2 Bac. Abr. 600; *Grant* v. *Astle*, 2 Doug. 730.
(*k*) *Ray* v. *Lister*, Andr. 351; *Cheveley* v. *Morris*, 2 W. Bl. 1300.
(*l*) 8 Rep. 157, a.
(*m*) *Bowers* v. *Nixon*, 12 Q. B. 546, 557.

was in the postea itself. But as soon as the postea had been amended by the proper authority, there was a variance between the postea and the judgment. Now this variance was in the nature of a misprision, and it was properly amended by making the judgment conformable to the postea." And Erle, J., said, "Take the matter up at the time of trial. The judge ought to make a note of the verdict, and this note is to be put out formally in the postea; and afterwards the officer is to enter up judgment according to the postea. On reference to the learned judge's notes, it turned out that the postea was not according to his note of the verdict. That was a misprision which ought to be amended. Then the judgment was not according to the postea. That was another misprision, which ought to be amended." Those errors which are amendable under these statutes are amendable as well after as before judgment (*n*); even where several terms have elapsed, and after error brought and joinder in error, and argument (*o*). And the Court of Error will amend the judgment returned to it by the amended record in the court below (*p*). And they have no authority to question the propriety of such amendment (*q*). They will also postpone delivering their own judgment, to allow time for an amendment (*r*).

No fixed limit seems to be assigned to the time during which such amendments may be made. In *Doe* v. *Perkins* and *Bowers* v. *Nixon* (*s*), it was said that the amendment might be made at any time. Where, however, eight years had elapsed after the judgment, and after the plaintiff's attention had been pointed to the mistake by a writ of error, and no application to amend was made till after reversal of the judgment on error, leave to amend was refused (*t*). Lord Ellenborough said, "The moment the writ of error was brought, it

(*n*) 8 Rep. 157, b.

(*o*) 8 Rep. 162, a; *Short* v. *Coffin*, 5 Burr. 2730; *Petrie* v. *Hannay*, 3 T. R. 659; *Doe* v. *Perkins*, *ib.* 749; *Hardy* v. *Cathcart*, 1 Marsh. 180; *Usher* v. *Dansey*, 4 M. & S. 94; *Richardson* v. *Mellish*, 3 Bingh. 334; [*Wilkinson* v. *Sharland*, 11 Ex. 33.]

(*p*) 8 Rep. 162, a; *Mellish* v. *Richardson*, 7 B. & C. 819.

(*q*) *Mellish* v. *Richardson*, 9 Bingh. 125; 1 Cl. & Fin. 224; [*Tetley* v. *Wanless*, L. R. 2 Ex. at p. 279; 36 L. J. Ex. at p. 155.]

(*r*) *Bowers* v. *Nixon*, 12 Q. B. 546; *Gregory* v. *Cotterell*, 25 L. J. Q. B. 33, 37.

(*s*) *Ubi sup.*

(*t*) *Harrison* v. *King*, 1 B. & A. 161.

was notice to a man who did not sleep the sleep of death over his rights." The fact of notice would probably be the test, for in another case, where a similar application was made nearly a year after trial, when the question arose in the third term after judgment, on the taxation of costs, it was held that the application was in time. Tindal, C. J., remarked that "probably he did not feel hurt by the form of the verdict, till the pressure arose upon the question of costs" (*u*).

It appears also to be doubtful whether such amendment can be made after judgment has been reversed on error. In *Richardson* v. *Mellish* (*x*), the postea was amended before the reversal, though the judgment was not amended in accordance with the postea till after the reversal. In *R.* v. *Carlile* (*y*), an amendment was allowed after reversal. That, however, was a criminal case, and the Attorney-General, who represented the crown, consented to it. In *Harrison* v. *King* (*z*) such an amendment was refused, not apparently so much upon the special ground that the judgment was reversed, as on the general principle of laches on the part of the plaintiff. In a later case a similar refusal was given (*a*). No decision, however, was pronounced as to the power to make such an amendment, though it was certainly very much doubted. There were many circumstances in the case decisive against its being allowed. The plaintiff had himself elected the count on which he would enter up judgment, after repeated discussions before the judges, and was therefore bound by his own choice (*b*). The postea had also been settled with considerable care by the judge who tried the cause. The Court had no original power to compel an amendment, but could only as his assessors and advisers in the matter recommend him to do so (*c*). Now as a matter of discretion, the lapse of two years after the reversal, and the full knowledge which the plaintiff had received by the writ of error, disentitled him to any indulgence.

(*u*) *Ernest* v. *Brown*, 4 Bingh. N. C. 166.
(*x*) 3 Bingh. 346.
(*y*) 2 B. & Ad. 971.
(*z*) 1 B. & A. 161.
(*a*) *Jackson* v. *Galloway*, 1 C. B. 280.
(*b*) *Holloway* v. *Bennett*, 3 T. R. 448; *Hardy* v. *Cathcart*, 5 Taunt. 11.
(*c*) *Per* Maule, J., 1 C. B. 296.

Power to increase or abridge the damages.

4. The power of the Court to alter the assessment of damages by their own independent authority has undergone a complete change. It was always admitted that in cases where the amount of damages was uncertain, their assessment was a matter so peculiarly within the province of the jury that the Court could not alter it (*d*). On the other hand it is laid down in old books, that wherever the demand of the plaintiff is certain, as in an action of debt, the verdict may be increased or abridged by the Court (*e*). And so in cases of mayhem, there is a long current of decisions to show that the Court have the power of increasing the damages given by the jury, either upon an inspection of the wound by the Court, or upon a certificate from the judge who tried the cause (*f*). But I am not aware of any instance in which such a jurisdiction has been exercised in modern times. The Court will not even increase the damages upon an affidavit by all the jury that they thought the effect of their verdict would be to give the plaintiff a larger sum than it did (*g*). Nor where the cause was undefended, and the plaintiff's counsel took a verdict for principal alone without interest (*h*). And where the damages found by the jury have been assessed on a principle assented to by the counsel on both sides, the Court will not interfere to alter the amount of the verdict, on affidavits that counsel were mistaken in that which they assumed as the basis of their calculation (*i*). And so in an action of debt on 2 & 3 Ed. VI. c. 13, which gives treble value for not setting out tithes, the jury found a verdict for the single value only, and it was held that the postea could not be amended by entering the verdict for the treble value. The Court said, "Had this been an action for penalties, and the jury, upon the plea of not guilty, had found that the defendant was guilty of the premises, and

(*d*) *Delves* v. *Wyer*, 1 Brownl. 204; Jenk. 2nd Cent. 68, pl. 29; *Bonham* v. *Sturton*, Dy. 105, a; *Hawkins* v. *Sciet*, Palm. 314.

(*e*) 11 H. IV. 10; 10 H. VI. 25; 32 H. VI. 1.

(*f*) 39 Ed. III. 20; *Tripcony's case*, Dyer, 105, a; *Mallet* v. *Ferrers*, 1 Leon. 139; *Hooper* v. *Pope*, Latch. 223; *Austin* v. *Hilliers*, Hardr. 408; *More's case*, Freeman, 173; *Cook* v. *Beal*, 1 Ld. Raym. 176; *Brown* v. *Seymour*, 1 Wils. 5; *Hoare* v. *Crozier*, 2 Tidd. Pra. 9th ed. 896; *Smallpiece* v. *Bockingham*, Bull. N. P. 21.

(*g*) *Jackson* v. *Williamson*, 2 T. R. 281.

(*h*) *Baker* v. *Brown*, 2 M. & W. 199.

(*i*) *Hilton* v. *Fowler*, 5 Dowl. 312.

that the single value of the tithes was so much, then the plaintiff might come to the Court, to have the judgment entered up for treble value as given by the statute. But if the jury, as in this case, find that the defendant owes the plaintiff so much, we are bound to conclude from the postea, that they have taken into consideration all the damages that the plaintiff was entitled to recover. There is nothing in this case to show that the jury have only found the single value, and we cannot allow the matter to be explained by affidavit" (*k*). On the other hand, where the plaintiff was entitled to treble damages, and the jury found a sum as and for single damages specifically, the Court allowed the amount to be trebled (*l*). But there the Court only gave the finding of the jury its legal effect (*m*). Where, however, the plaintiff had evidently sustained some damage, but the jury, being unable to ascertain the amount found a verdict for the defendant, the Court permitted the plaintiff to enter a verdict for nominal damages (*n*).

Nor will the Court in any case now reduce the damages without the consent of the plaintiff, and if he refuse, they can do nothing but order a new trial (*o*).

It is also laid down in many old cases, that damages upon a writ of inquiry may always be increased or reduced at the pleasure of the Court (*p*), because the Court themselves, if they had so pleased, might upon an interlocutory judgment have assessed the damages, and the inquisition is only a matter of course, taken to satisfy the conscience of the Court (*q*). In practice, however, the Court never do so now, but award a new writ of inquiry in all cases in which they would award a new trial (*r*).

Leave to reduce or increase the damages.

Where the amount of damages depends upon a question of law, the general mode adopted, with a view to save the expense of a new trial, is to obtain the opinion of the jury upon the amount of damages proper to be given in either

(*k*) *Sandford* v. *Clarke*, 2 Chitt. 351.
(*l*) *Baldwyn & Girrie's case*, Godb. 245.
(*m*) 2 M. & W. 199.
(*n*) *Feize* v. *Thompson*, 1 Taunt. 121.
(*o*) *Leeson* v. *Smith*, 4 Nev. & M. 304; *Moore* v. *Tuckwell*, 1 C. B. 607.
(*p*) 14 H. IV. 9; 3 H. VI. 29; 19 H. VI. 10, 28; *Cook* v. *Beal*, 1 Ld. Raym. 176.
(*q*) Yelv. 152; 2 Wils. 374; *Bruce* v. *Rawlins*, 3 Wils. 62.
(*r*) Chitt. Prac. 9th ed. 939, 1438; [12th ed., 1004, 1533.]

alternative, or to settle such amount by consent. A verdict is then entered according to one view of the case, and leave is given either to the plaintiff to move to have it increased, or to the defendant to have it reduced (*s*). The motion in this case must be made within the time limited for moving for a new trial (*t*).

In one case where a rule *nisi* to reduce damages had been granted, the Court refused to allow execution to issue for the part admitted, unless the plaintiff would resign the rest. Vaughan, B., said, "That the object was to have execution without any judgment to warrant it" (*u*). But it seems that where part is admitted to be due, the Court will make it a condition of granting the rule *nisi* to reduce, that the plaintiff be allowed to issue execution for and levy that part (*x*).

New trial granted

5. It appears then that the question of practical importance with regard to the power of the Court over the amount of damages, is as to the cases in which a new trial will be granted.

where there has been error in matter of law.

This will always be allowed where the damages were affected in amount by improper evidence being admitted, or the jury being allowed to take into consideration a ground of claim, or mitigation which could not be supported in law (*y*); or where the jury give greater damages than are laid in the declaration (*z*); or where a case of surprise is made out (*a*); or where the judge has omitted to direct the jury as to the proper measure of damages (*b*); or where there has been positive misdirection on his part, or misbehaviour on the part of any other person (*c*). Where, however, on the execution of a writ of inquiry, the jury asked what amount of damages would carry costs, and the undersheriff told them any sum would do, upon which they returned a verdict of ½*d.*; it was held to be no ground for a new trial, as it did not amount

(*s*) Chitt. Prac. 430, 9th ed.; [460, 12th ed.]
(*t*) *Masters* v. *Farris*, 1 C. B. 715.
(*u*) *Hellings* v. *Young*, 3 Sco. 770.
(*x*) *Davey* v. *Phelps*, 2 M. & Gr. 300; *Bate* v. *Pane*, 13 Jur. 609.
(*y*) *Woodford* v. *Eades*, 1 Stra. 425; *Tutton* v. *Andrews*, Barnes, 448; *Jenney* v. *Brook*, 6 Q. B. 323; *Lock* v. *Ashton*, 12 Q. B. 871.
(*z*) *Seale* v. *Hunter*, Lofft, 28.
(*a*) *Hall* v. *Stone*, 1 Stra. 515.
(*b*) *Knight* v. *Egerton*, 7 Exch. 407; *Hadley* v. *Baxendale*, 9 Exch. 341; 23 L. J. Ex. 179.
(*c*) *Markham* v. *Middleton*, 2 Stra. 1259.

to a misdirection, not being wrong information on a matter which was directly in issue, or which was substantially connected with the finding on the issue (*d*).

New trial

Finally, a new trial will sometimes be granted, on the ground that the damages are too small, or excessive.

will not be granted, where damages are unliquidated on the ground of their being too small.

It has been frequently decided that where the action is for unliquidated damages, the Court will not grant a new trial on account of their being too low (*e*), unless there has been some mistake in a point of law on the part of the judge who presided, or in the calculation of figures by the jury (*f*). The alleged reason is, that new trials came only in the room of attaints, as being an easier and more expeditious remedy, and no attaint would lie for giving too small damages (*g*). Accordingly a new trial has been refused, where in an action of trespass, for bringing the plaintiff before a magistrate on an unfounded charge of felony, only ¼*d.* damages were given, though a question of character was involved (*h*). So where the jury only gave 5*l.* in an action for maliciously suing out a commission of bankruptcy against the plaintiff, though he proved that it had cost him 30*l.* to set it aside, and no evidence was offered on behalf of the defendant (*i*). And so where in an action for assault and battery only 8*l.* were assessed, though it appeared that his cure had cost him 18*l.*, and no evidence was given to the contrary (*k*). In one case, where the action was for running over the plaintiff, whose thigh was broken, and his surgeon's bill came to 10*l.*, a new trial was granted, the jury having only awarded ¼*d.* damages. Lord Denman said, "A new trial on a mere difference of opinion as to amount may not be grantable, but here are no damages at all" (*l*). On the other hand, in a later case, where the same damages were

(*d*) *Grater* v. *Collard*, 6 Dowl. 503. [See *Kilmore* v. *Abdoolah*, 27 L. J. Ex. 307.]

(*e*) *Marsham* v. *Buller*, 2 Roll. Rep. 21; *Hayward* v. *Newton*, 2 Stra. 940; *Barker* v. *Dixie*, *ibid.* 1051; *Lord Gower* v. *Heath*, Barnes, 445; *Burges* v. *Nightingale*, Barnes, 230; *Russel* v. *Ball*, Barnes, 455; Anon. 2 Leon. 214; *Manton* v. *Bales*, 1 C. B. 444.

(*f*) *Rendall* v. *Hayward*, 5 Bingh. N. C. 424; [*Forsdike* v. *Stone*, L. R. 3 C. P. 607; 37 L. J. C. P. 301; *Wilson* v. *Hicks*, 26 L. J. Ex. 242; *Nichol* v. *Bestwick*, 28 L. J. Ex. 4.]

(*g*) *Barker* v. *Dixie*, *ubi sup.*

(*h*) *Apps* v. *Day*, 14 C. B. 112. [And see *Forsdike* v. *Stone*, *supra.*]

(*i*) *Mauricet* v. *Brecknock*, 2 Dougl. 509.

(*k*) *Donelly* v. *Baker*, Barnes, 154.

(*l*) *Armytage* v. *Haley*, 4 Q. B. 917.

given in an action against a surgeon for negligence, whereby the plaintiff lost his thigh, a new trial was refused. Tindal, C. J., said, "It is not usual with the Court to grant a new trial on the ground that the damages are smaller than the Court may think reasonable. At any rate a new trial ought not to be granted on such a ground, unless the judge who tried the cause is dissatisfied with the smallness, which, as the learned judge has informed us, is not the case in the present instance" (*m*). So strict is the rule, that no remedy can be had where the jury only gave 1*s*. damages, though it was admitted that they would have given 40*s*. had they known that amount was necessary to carry costs (*n*). Nor will a new trial be granted on the ground that from the smallness of the damages the jury must have come to a compromise, unless from the circumstances of the case, it is evident that there has been a total refusal of the jurors to discharge their duty, and the verdict is necessarily wholly inconsistent; as, for instance, where where is a verdict for the plaintiff of ¼*d*. on a bill of exchange, where the only plea was that the bill was forged (*o*).

unless there has been misconduct of the jury.

New trial will be granted where there is a measure of damages.

Even independently of misconduct on the part of the jurors a new trial will be granted where the action is on a contract for a fixed sum, and by some mistake or accident a verdict has been taken for a smaller amount; as, for instance, on a covenant to pay a sum of money generally (*p*); or as liquidated damages (*q*); or in an action on a promissory note, where less than the amount has been given (*r*); or interest has been withheld without proper cause (*s*). And so it was allowed where the plaintiff, in an undefended action for a mortgage debt, had omitted to have interest assessed (*t*).

(*m*) *Gibbs* v. *Tunaley*, 1 C. B. 640.

(*n*) *Mears* v. *Griffin*, 1 M. & Gr. 796; [*Kilmore* v. *Abdoolah*, *supra*.]

(*o*) *Richards* v. *Rose*, 23 L. J. Ex. 3; 9 Exch. 218, S. C. [See *Kelly* v. *Sherlock*, L. R. 1 Q. B. at p. 695; 35 L. J. Q. B. at p. 212; *per* Mellor, J.]

(*p*) *Anon.*, Salk. 647; *Lethbridge* v. *Mytton*, 2 B. & Ad. 772.

(*q*) *Farrant* v. *Olmius*, 3 B. & A. 692.

(*r*) *Russel* v. *Ball*, Barnes, 455.

(*s*) *Laing* v. *Stone*, 2 M. & R. 561; *Du Belloix* v. *Waterpark*, 1 D. & R. 16; *Cameron* v. *Smith*, 2 B. & A. 308.

(*t*) *Baker* v. *Brown*, 2 M. & W. 199. [See further as to setting aside a judgment on the ground of mistake in claiming too little, *Cannan* v. *Reynolds*, 5 E. & B. 301; 26 L. J. Q. B. 62.]

Contingent assessment.

Where the plaintiff has suffered damages to be assessed contingently, he cannot afterwards claim a new trial, on the ground of their being insufficient (*u*).

New trial on the ground of damages being excessive.

The power of the Court to grant a new trial, on account of the excessiveness of damages, seems to be comparatively modern, and to have sprung up when attaints fell into disuse (*x*.) Accordingly the Court held in several cases that they had no right to interfere, where there had been no misbehaviour on the part of the jury, and there was no measure of damages by which they could correct the mistake (*y*). It is now, however, well acknowledged, that whether in actions for malicious prosecution, words, or any other matter, if the damages are clearly too large, the Court will send the inquiry to another jury (*z*). But it must appear from the amount of damages, as compared with the facts of the case laid before the jury, that the jury must have acted under the influence either of undue motives, or of some gross error and misconception on the subject (*a*). And in a case of uncertain damage, where matters have been left properly for all the parties to the sound discretion of the jury, in a subject of which they are competent and proper judges, a new trial will not be granted, "because if the Court had been to fix the damages, they might have given less" (*b*). The case must be very gross, and the damages enormous, for the Court to interpose (*c*). And where the judge has recommended the jury to give nominal damages, and they award substantial damages, the verdict cannot merely on this account be treated as perverse (*d*).

Every case must of course be judged upon its own peculiar facts. It may be useful, however, to give a few instances of the manner in which the Courts have exercised their discretion upon this point.

Cases in which it has been refused.

Trespass.

Where custom-house officers entered the plaintiff's dwelling-house in the day, without a constable, but with a writ of

(*u*) *Morrish* v. *Murrey*, 13 M. & W. 52; *Booth* v. *Clive*, 10 C. B. 827.
(*x*) *Barker* v. *Dixie*, 2 Stra. 1051.
(*y*) *Wilford* v. *Berkeley*, 1 Burr. 609; *Duberley* v. *Gunning*, 4 T. R. 651.
(*z*) *Per* Mansfield, C. J., *Hewlett* v. *Cruchley*, 5 Taunt. 277; *Gilbert* v. *Burtenshaw*, Cowp. 230.
(*a*) *Per* Lord Ellenborough, *Chambers* v. *Caulfield*, 6 East, 256.
(*b*) *Gilbert* v. *Berkinshaw*, Lofft, 771, 774.
(*c*) *Per* Yates, J., 3 Wils. 63; and see *per* Cur. 2 Wils. 250; and *per* Pratt, C. J., 2 Wils. 207.
(*d*) *Chilvers* v. *Greaves*, 5 M. & Gr. 578.

assistance, to search for uncustomed goods, and stayed in the house about an hour, but broke open no door, or lock, or bolt, and did little or no damage, sums of 100*l.* and 200*l.* were held not to be excessive. Gould, J., said, "The entering the plaintiff's house under colour of legal authority aggravates the trespass" (*e*). In trespass for forcible entry into a dwelling-house, and remaining there three or four days under colour of a distress for rent, it appeared that one defendant claimed a title to the property, which he chose to assert in this manner, though without a shadow of right. The others were a broker and assistants. The Court refused to set aside a verdict for 1000*l.* (*f*). Trespass against a landlord for injury to his tenant's crops, by entering to cut and remove timber without applying for leave. The whole value of the crops was 200*l.*, and the jury found a verdict for 300*l.* The Court refused to set it aside. Maule, J., said, "If we were to hold that the jury, in estimating the damage for an unlicensed trespass of this sort, are to be restrained to exactly the amount of the injury sustained by the plaintiff, it would in effect be placing the wrong-doer upon precisely the same footing as one who enters with the owner's permission. Besides it is to be observed that this was not the case of a single act of trespass, but of a series of trespasses, persisted in day after day, and for several weeks, and that this was done for the pecuniary benefit of the defendant" (*g*). So where the defendant, a banker and M.P., persisted in shooting upon the plaintiff's land, though requested to desist, and used insolent language, 500*l.* was held not to be excessive (*h*).

Assault.

Where the defendant struck the plaintiff in a quarrel, in the course of which the plaintiff had called him a scoundrel, a verdict for 200*l.* was sanctioned (*i*). And Heath, J., said, "he remembered a case, where a jury gave 500*l.* damages for merely knocking a man's hat off, and the Court refused a new trial" (*k*).

(*e*) *Bruce* v. *Rawlins*, 3 Wils. 61; *Redshaw* v. *Brook*, 2 Wils. 405. [See also *Thomas* v. *Harris*, 27 L. J. Ex. 353.]

(*f*) *Bland* v. *Bland*, 1 H. & W. 167. See *Gregory* v. *Cotterell*, 22 L. J. Q. B. 217.

(*g*) *Williams* v. *Currie*, 1 C. B. 841, 847.

(*h*) *Merest* v. *Harvey*, 5 Taunt. 442.

(*i*) *Grey* v. *Grant*, 2 Wils. 252; *Ducker* v. *Wood*, 1 T. R. 277.

(*k*) 5 Taunt. 443.

In the celebrated cases of arrest under general warrants, 300*l.* was held not to be excessive in an action against the king's messenger, who had treated the plaintiff with great civility, and only detained him six hours (*l*). And in a more aggravated case of the same nature, where the plaintiff was kept in custody for six days, a verdict for 1000*l.* was sustained (*m*). So 200*l.* damages were held not to be too great, where the plaintiff had been kept a night in custody on a charge of felony (*n*). And where the plaintiff in an action for false imprisonment was a native of Minorca, and the defendant was the governor, 3000*l.* damages was allowed (*o*). False imprisonment.

Where the defendant, an attorney, brought seven indictments for felony against his clerk, keeping the matter secret from him, and gave no evidence when the case came on, upon which the plaintiff sued him for a malicious prosecution, it was held that 2000*l.* damages was not excessive; and that it was no excuse that the defendant had obtained counsel's opinion advising the prosecution, when the case laid before him was not rightly stated. Mansfield, C. J., asked, "Could any one say that any rational man of character would for 2000*l.* put himself in this situation? If not, the damages are not excessive" (*p*). And in another case, where the plaintiff was arrested and indicted for felony, out of mere revenge, and without a shadow of pretence, 10,000*l.* was allowed (*q*). Malicious prosecution.

It has been said in cases of seduction, that actions of that sort are brought for example's sake, and that although the plaintiff's loss may not really amount to the value of 20*s.*, yet the jury do right to give liberal damages (*r*); accordingly 200*l.* was allowed in one case, though the defendant had been placed in circumstances of peculiar temptation by the female's own mother (*s*). So in cases of crim. con., verdicts of 500*l.* and 5000*l.* were sustained, though in the former case the Seduction. Crim. con.

(*l*) *Huckle* v. *Money*, 2 Wils. 205.
(*m*) *Beardmore* v. *Carrington*, 2 Wils. 244.
(*n*) *Edgell* v. *Francis*, 1 M. & Gr. 222.
(*o*) *Fabrigas* v. *Mostyn*, 2 W. Bl. 929.
(*p*) *Hewlett* v. *Cruchley*, 5 Taunt. 277.
(*q*) *Leith* v. *Pope*, 2 W. Bl. 1327.
(*r*) *Per* Wilmot, C. J., *Tullidge* v. *Wade*, 3 Wils. 18.
(*s*) *Bennett* v. *Allcott*, 2 T. R. 166.

defendant, who was a clerk at 50*l.* a year, had been himself seduced by the wife; and in the latter, the plaintiff was at the time keeping a mistress, and had permitted the defendant to take indecent liberties with his wife in his presence (*t*). And 2000*l.* was held not to be excessive, though some time before a deed had been entered into, providing for the future separation of husband and wife, upon certain contingencies, but under terms which entitled him to her assistance in the care of his children (*u*).

Breach of promise of marriage.

Sums of 400*l.* and 3500*l.* have been allowed in actions for breach of promise of marriage, according to the wealth of the defendants (*x*).

Trover.

In trover for a diamond necklace, part only of which was traced into the defendant's hands, the Court refused to set aside a verdict for the whole value, as the defendant's affidavit did not allege that the whole of it had never been in his possession (*y*). And so in an action for an apothecary's bill, consisting of a great number of items, a rule for a new trial was refused, where the jury had given a verdict for the whole sum claimed, though every item was not proved, evidence having been given as to some of them (*z*). But a contrary decision was given in another case, where the claim was for work and labour, and an entire verdict given, several of the items being unsustained (*a*).

Where the plaintiff is willing to rectify any mistake in the assessment, the Court will not set aside the verdict if it can possibly be sustained, as this would be to allow the defendant a fresh chance of a finding upon the issues, under the pretext of objecting to the amount of damages (*b*). Nor will they, upon an application for a new trial on the ground of excessive damages, hear affidavits of the defendant's witnesses to explain or add to anything said by them at the trial (*c*).

(*t*) *Wilford* v. *Berkeley*, 1 Burr. 609; *Duberley* v. *Gunning*, 4 T. R. 651; *sed quære?*
(*u*) *Chambers* v. *Caulfield*, 6 East, 244.
(*x*) *Harrison* v. *Cage*, Carth. 467; *Wood* v. *Hurd*, 2 Bingh. N. C. 166.
(*y*) *Mortimer* v. *Cradock*, 12 L. J. C. P. 166.
(*z*) *Wheeler* v. *Sims*, 5 Jur. 151.
(*a*) *Brewer* v. *Jackson*, 5 Jur. 701.
(*b*) *Thomas* v. *Fredricks*, 10 Q. B. 775.
(*c*) *Phillips* v. *Hatfield*, 8 Dowl. 882.

Where an excessive verdict is given, it is usual for the judge to suggest to counsel to agree on a sum, to prevent the necessity of a new trial (*d*).

Cases in which a new trial was allowed.

The following are instances of a contrary discretion being exercised by the Court. Where the action was for diverting plaintiff's water-course, and 3000*l.* was given, the Court set it aside as being excessive and not warranted by the evidence; it being a mere question of property as stated on the record, where there was something to measure the damages by, namely, the deterioration of the property itself, and therefore not like cases of personal injuries, as actions for adultery, slander, &c. Though they said that even in a case like the present, which was attended with several circumstances of aggravation, they would not measure the damages which the jury had given in a nice balance; but making a very liberal allowance in that respect, they were still bound to take care that the verdict should not greatly exceed the damage proved. They ordered the former verdict, however, to stand security for the damages that might be given on the second trial (*e*). And where, in an action for assault, it appeared that the plaintiff was servant to the defendant, and that on receiving a slight blow for impertinent behaviour he had fallen upon his master, and beaten him violently, a verdict of 40*s.* was set aside as excessive (*f*). In a later case an importunate beggar having refused to quit defendant's house, defendant had him arrested by a constable, and kept in custody one night at an inn. The next day he was brought again before the defendant, and said he must have some money, upon which defendant told him he might have two sovereigns, or go before a magistrate. Plaintiff consented to take the money, but said he must have something more to pay his expenses, upon which defendant gave him half-a-crown and some refreshment, and plaintiff went away. He sued defendant, and recovered 100*l.*, no plea of accord and satisfaction having been pleaded. A new trial was granted, on the ground that he had himself set a limit upon his demand (*g*).

(*d*) 7 Bingh. 320.
(*e*) *Pleydell* v. *Earl of Dorchester*, 7 T. R. 529.
(*f*) *Jones* v. *Sparrow*, 5 T. R. 257.
(*g*) *Price* v. *Severn*, 7 Bingh. 316.

New trial where verdict is under 20*l.*

The Courts make it a rule not to grant a new trial when the verdict is for less than 20*l.*, unless they can grant it without costs (*h*). This rule, however, does not apply where the matter in dispute involves a question of permanent right (*i*), or where the verdict is perverse (*k*). And in a recent case, where the verdict was under 20*l.*, a new trial was granted, on the ground that the judge who tried the cause was dissatisfied with the verdict, and that there was an uncontradicted affidavit that one of the jurymen had misconducted himself, by expressing a strong opinion against the defendant, when he had not heard his case, but only that of the plaintiff (*l*). Nor does the rule extend to cases tried before an inferior court on a writ of trial (*m*), in which a new trial will be granted unless the damages are under 5*l.* (*n*).

A judgment may be maintained as to part, and reversed as to damages (*o*).

(*h*) —— v. *Phillips*, 1 C. & M. 26; *Woods* v. *Pope*, 1 Bingh. N. C. 467.

(*i*) *Turner* v. *Lewis*, 1 Chitt. Rep. 265; *Allum* v. *Boultbee*, 9 Exch. 739, overruling *Sowell* v. *Champion*, 6 A. & E. 407.

(*k*) *Freeman* v. *Price*, 1 Y. & J. 402. [A perverse verdict would seem to be one which is contrary to the direction of the judge, there being no dispute as to the facts; see *per* Jervis, C. J., in *Hawkins* v. *Alder*, 18 C. B. 640; and *per* Bramwell, B., in *Adams* v. *Midland Ry. Co.*, 31 L. J. Ex. 35.]

(*l*) *Allum* v. *Boultbee*, *ubi sup.* [The rule is not altered by the C. L. P. Act, 1854, 17 & 18 Vict. c. 125, s. 44; *Hawkins* v. *Alder*, 18 C. B. at p. 641, *per* Willes, J.]

(*m*) *Taylor* v. *Helps*, 5 B. & Ad. 1068.

(*n*) *Packham* v. *Newman*, 1 C. M. & R. 585; *Fleetwood* v. *Taylor*, 6 Dowl. 796.

(*o*) *Frederick* v. *Lookup*, 4 Burr. 2018; *Cuming* v. *Sibly*, *ibid.* 2489.

CHAPTER XX.

ASSESSMENT OF DAMAGES IN THE COURT OF CHANCERY.

[THE Chancery Amendment Act, 1858 (21 & 22 Vict., c. 27), commonly called Lord Cairns' Act, enacts that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance" (*a*). The Court may cause the amount of the damages to be assessed, or any question of fact arising in the suit to be tried, by a special or common jury before the Court itself (*b*), or before the Court itself without a jury (*c*), or by a jury before a judge of the Superior Courts of Common Law at Nisi Prius, or at the assizes, or before the sheriff of any county or city (*d*). New trials may be applied for; and where the trial has been before the Court without a jury, the application may be made either to the judge before whom the trial was had or to the Court of Appeal in Chancery (*e*).

21 & 22 Vict. c. 27, Lord Cairns' Act.

Where the Court awards damages, and directs a trial or writ of inquiry as to the amount, the defendant may, on obtaining leave of a judge at chambers, pay money into court. In the event of a larger sum for damages not being awarded,

Money may be paid into court.

[(*a*) 21 & 22 Vic. c. 27, s. 2.
(*b*) *Ibid.* s. 3.
(*c*) *Ibid.* s. 5.
(*d*) *Ibid.* s. 6.
(*e*) *Ibid.* s. 5.]

the plaintiff will have to pay the costs of the trial or inquiry, unless the Court otherwise directs (*f*).

It is not compulsory on the Court to award damages.

It is in the discretion of the Court whether it will award damages under this Act, or leave the plaintiff to obtain them at law, and this notwithstanding the "Chancery Regulation Act, 1862" (25 & 26 Vict. c. 42), commonly called Sir John Rolt's Act, which enacts that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery is sought in any cause instituted therein, every question of law or fact cognizable in a Court of Common Law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same Court (*g*).

The Court will not interfere to award damages under 21 & 22 Vict. c. 27, where it would not have interfered to grant relief before the statute (*h*)—as, for example, where the suit is for specific performance of an agreement for a partnership (*i*). But damages may be awarded although the case for an injunction fails (*k*), or although from circumstances which have arisen since the institution of the suit an injunction or specific performance cannot be decreed. For example, in a suit for specific performance, where performance was obtained from the defendant before the hearing, the Court directed the damages to be assessed by a jury in a court of common law (*l*). And where the suit was to restrain the infringement of a patent, an inquiry was directed as to damages, although the patent had expired pending the litigation (*m*). But the Court will not grant relief where the bill is filed for damages only (*n*). Therefore James, V. C., refused to entertain a bill filed so immediately before the expiration of a patent that it was impossible to obtain any equitable relief before the patent expired. He treated it as a mere device to obtain an award

[(*f*) Consolidated Orders xli., Rule 40. Part iv. of this order regulates the proceedings under the Act, and schedule (N) to the orders contains the forms referred to in the order.

(*g*) *Johnson* v. *Wyatt*, 2 De G. J. & S. 18; *Swaine* v. *G. N. Ry. Co.*, 4 De G. J. & S. 211; 33, L. J. Ch. 399; *Durell* v. *Pritchard*, L. R. 1 Ch. 244; 35 L. J. Ch. 223.

(*h*) *Per* Giffard, V. C., L. R. 7 Eq., at p. 116.

(*i*) *Scott* v. *Rayment*, L. R. 7 Eq. 112.

(*k*) *Catton* v. *Wyld*, 32 Beav. 266; *Eastwood* v. *Lever*, 4 De G. J. & S. 114; 33 L. J. Ch. 355.

(*l*) *Cory* v. *Thames Iron Works Company*, 11 W. R. 589.

(*m*) *Davenport* v. *Rylands*, L. R. 1 Eq. 302; 35 L. J. Ch. 204.

(*n*) *Middleton* v. *Magnay*, 2 H. & M. 233.]

of damages in the Court of Chancery instead of in a court of Common Law (*o*).

The power of a court of equity to give damages is not confined to cases in which the plaintiff could recover damages at law (*p*); and the damages awarded differ from those which could be obtained at law in being given by way of compensation for permanent injury once for all, not as at law where successive actions may be brought and damages recovered *toties quoties* (*q*).

Special damage must be shown.

Damages will not be awarded in addition to specific performance unless special damage is shown to have resulted from the delay in completing the contract (*r*).

Damages may be obtained under general prayer for relief.

They may be awarded although not specifically asked for in the bill, the general prayer for relief being sufficient(*s*)].

[(*o*) *Betts* v. *Gallais*, L. R. 10 Eq. 392.
(*p*) *Eastwood* v. *Lever*, 4 De G. J. & S. 114; 33 L. J. Ch. 355.
(*q*) *Per* Lord Cranworth, C., *Stokes* v. *City Offices Co., Limited*, 13 L. T. N. S. 81.
(*r*) *Chinnock* v. *Marchioness of Ely*, 2 H. & M. 220; 34 L. J. Ch. 399.
(*s*) *Catton* v. *Wyld*, 32 Beav. 266. See, further, as to the Act, and for cases in which the Court, in its discretion, has awarded or refused damages, Morgan's Chancery Acts and Orders, 261, 4th ed.; Kerr on Injunctions, 221; Joyce on Injunctions, 593; and Daniell's Chancery Practice, vol. i., p. 946, 5th ed.]

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